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BEFORE THE COPYRIGHT ROYALTY JUDGES FEB 1 2 2008

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In the Matter of: :

MECHANICAL AND DIGITAL : Docket No.:

PHONORECORD DELIVERY RATE : 2006-3-CRB DPRA

ADJUSTMENT PROCEEDING. : Volume 1 - P.M.

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Washington, D.C.

Monday, January 28, 2008

The following pages constitute the proceedings held in the above-captioned matter, held at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before Robert M. Jakupciak, RPR, of Capital Reporting Company, a Notary Public in and for the District of Colubmia, beginning at 1:00 p.m.

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| 1  | APPEARANCES   |
| 2  | Copyright Royalty Tribunal:   |
| 3  | CHIEF JUDGE JAMES SLEDGE  |
| 4  | JUDGE WILLIAM ROBERT  |
| 5  | JUDGE STANLEY C. WISNIEWSKI   |
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| 1   | PROCEEDINGS  |
| 2   | (1:00 p.m.)  |
| 3   | Whereupon,   |
| 4   | JUDGE SLEDGE: We will come to order.                 |
| 5   | MR. SMITH: May I proceed, Your Honor?                |
| 6   | JUDGE SLEDGE: Of course.                             |
| 7   | MR. SMITH: May it please the Court. I'm              |
| 8   | Paul Smith. It's a pleasure to be back in front of   |
| 9   | this tribunal representing the Recording Association |
| 10  | of America in this important matter. I want to       |
| 11  | introduce the other members of our team who will be  |
| 12  | presenting witnesses or handling witnesses in this   |
| 13  | trial. They include Mr. Handzo and Mr. Freedman,     |
| 14  | who I believe you know, and also Molly Moran,        |
| 15  | Lindsey Harrison way back there, Mathew Hersh, and   |
| 16  | Anjan Chovdhury right there.                         |
| 17  | JUDGE SLEDGE: Ms. Harrison has been here             |
| 18  | before.  |
| 19  | MR. SMITH: But that was in a case I                  |
| 20  | wasn't in. I forgot that.                            |
| 21  | In our view it's essential to assess the             |
| 22  | party's competing positions in the case with a clear |
|     |  |

Page 122 understanding of two main things. One, how the 1 mechanical rate has evolved through time, and two, 2 the current state of the music industry. 3 The RIAA proposal to reduce the current 4 5 mechanical royality rate from 7.8 percent of the 6 wholesale revenue makes sense we submit in part 7 because it would give the publishers and songwriters about the same share of revenues produced from the 8 sales of recordings that they receive for many, many 9 10 That share reflects the division of labor in 11 the music industry between the record companies who 12 make the vast majority of the investments in the 13 sound recordings from which everyone can benefit and the publishers who will primarily grant licenses and 14 15 collect and distribute royalties to the songwriters. 16 By contrast, the proposal by the publishers and songwriters for a large increase in 17 the mechanical rate would take the windfall that 18 19 they have already received this decade, and they 20 received that windfall as CD prices have been going 21 down as the mechanical royalties have been going up 22 and they would make the windfall even bigger.

Page 123 In essence, what the music publishers and 1 2 the songwriters are relying on here is that 3 venerable legal principle, Your Honors, heads we 4 win, tails you lose. In 1980 when record sales and 5 prices had been going up for a number of years while 6 the mechanical rate stayed flat, causing the 7 mechanical royality rate to shrink to around 3 and a 8 half percent of the retail price of a record, the 9 publishers argued we need to raise the rate to get 10 it back up to the share we have always had in the 11 past. They argued that that was 6 percent of 12 The copyright royalty tribunal agreed with retail. 13 them on the principle but said, no, that's 5 percent 14 of retail, and set a 4-cent rate which was five 15 percent of the list price of records in that day and 16 age. 17 Now we've seen the opposite phenomenon for the past 8 years or so. The mechanical rate has 18 19 continued to go up and up even as sales and prices 20 of CDs have been going down, causing extraordinary 21 economic strain in the record industry. 22 The effect has been to give the publishers

Page 124 and songwriters right now today as we sit here the 1 2 largest share of the revenues produced by sales of 3 record albums that they have ever received. And the 4 publishers also now receive in the United States 5 significantly more as a percentage of the price of 6 sound recordings than they do just about anywhere else in the entire world. 8 Now, given those realities, you would 9 think everyone would understand the need to scale 10 the mechanical rate back. That's just the way the 11 world is now. The price is too high. But that's 12 obviously not the case as we heard this morning. 13 The publishers want to increase the rate rather 14 dramatically even as prices and sales continue to 15 fall. So it's heads they win in 1980 when the 16 market and price is going up and it's tails we lose 17 now with the market and prices going down. 18 Regardless of the economics of the 19 industry, the answer from the publisher seems always 20 to be the same: Take more from record companies and 21 give more to the publishers.

Now, having made that central point, let

22

Page 125 me talk for a few minutes if I might about the how 1 2 the four statutory factors under Section 801(b) 3 apply in this context and in this case. The key to applying those factors is to 4 5 keep in mind some basic facts about the roles played 6 by record companies and music publishers. 7 companies have always been the ones who create the 8 products, the products that are sold to the public and the products which really are the primary source 9 10 of revenues in both industries. As you'll hear, the 11 record companies spend literally billions of dollars 12 each year in this effort employing thousand of 13 people to create market and distribute sound 14 recordings. 15 They make their money through the sales of 16 those recordings. With the exception of digital performance of sound recordings and the use in TV 17 and movies, record companies receive nothing when 18 19 those master recordings that they've created are 20 performed on radio, in bars, in stadiums, in 21 But the contrast between them on that concerts. 22 score and the music publishers could not be more

Page 126 1 significant. 2 The publishers manage the rights to song used in recordings and receive a small percentage on 3 each record sale. But they also benefit from other 4 revenue sources that depend on the record company's 5 6 ability to popularize music. Once a recording is 7 produced and it becomes a hit, what happens? The 8 publisher and ultimately the songwriter get paid 9 every time it's played in a bar, in a stadium, in a 10 concert, on the radio or in a movie or a TV show. 11 In recent days as the mechanical royalties 12 have leveled off, flattened out as a result of the dropping of the price of the volume of CD sales and 13 14 the raising of the price, you end up with a flat line on mechanical royalties industry-wide. 15 16 other sources of revenues have been shooting way up. 17 And the evidence will show that they have become an enormously important part of the revenues 18 19 of the publishers and the songwriters and that these are revenues produced directly as a result of the 20 21 fact that recordings are being made, songs are 22 becoming popular hits.

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|----|--|
| 1  | So the result is that the music publishers           |
| 2  | to this day remain extraordinarily profitable. You   |
| 3  | were shown some profit margin figures by Mr. Cohen   |
| 4  | of record companies. I think the evidence will show  |
| 5  | that those figures actually don't give an accurate   |
| 6  | figure even though they are much smaller than the    |
| 7  | figures for music publishers. What the evidence      |
| 8  | will show for music publishers is that their profits |
| 9  | are really extraordinary.                            |
| 10 | The EMI publishing division, had reports             |
| 11 | of a profit figure in the range of 25 to 30 percent  |
| 12 | on its operations consistently day in and out, and   |
| 13 | evidence will show that's not atypical. So these     |
| 14 | are extraordinarily profitable businesses.           |
| 15 | Precisely because what they do is they               |
| 16 | have a catalog of songs and they basically take      |
| 17 | money in and pass some of it out but they keep a     |
| 18 | very large percentage of it. The record companies    |
| 19 | on other hand are taking enormous risks all the time |
| 20 | and make huge investments and in fairness need to    |
| 21 | get the vast majority of what records produce.       |
| 22 | That's the only result that makes even marginal      |

Page 128 1 economic sense. 2 Music publishing, as I just suggested, is 3 more like an annuity business with low risk and consistency very significant margins. You are going 4 5 to hear the business described that way not by me 6 but by the publishers themselves and the 7 prospectuses they put out when they try to entice 8 investors to buy a share in their businesses. 9 You are going to hear about how publishing 10 companies are valued as companies at very, very high 11 multiples of their revenues precisely because they are so low risk. When you buy into a publishing 12 company you know exactly what you are going to get 13 because the record of profitability is 14 15 extraordinarily consistent. 16 Now, given this basic difference between 17 the high risk industry and the low risk industry and 18 the high investment industry and the low investment 19 industry, it's not surprising that the downturn in 20 the music industry in the past 8 years has hit the 21 record companies much, much harder than it hit 22 publishers. Let me interrupt myself and put this

Page 129 1 up. 2 What this is is an exhibit Pardon me. from the testimony of our economics expert, Dr. 3 4 David Teece. Just a basic public data 5 representation of his best estimate of where the revenues are going in the music industry and with 6 7 the publishers being the red line and the recording 8 industry being the blue line. So this shows you 9 basically what the economic situation is that we are 10 dealing with as we come into this trial, with 11 obviously a very high slope up for the publishers 12 and a sloping down line for the recording industry. Now, the publishers will be calling 13 experts, Claire Enders and Helen Murphy, you heard 14 15 some talk about them this morning, who will say the economic problems of the record companies are a mere 16 17 blip, that it's just going to fix itself in no time 18 as soon as the digital conversion takes place. But what the evidence will really show is that the 19 record companies have invested millions and millions 20 of dollars in trying to bring about that digital 21 22 conversion and they still confront an enormous

|    | Page 130   |
|----|--|
| 1  | problem with piracy. And they meanwhile have had to  |
| 2  | cut massive amounts of expense, personnel and other  |
| 3  | kinds, to try to remain in the black and had to do   |
| 4  | all this because CD sales simply keep falling. 2007  |
| 5  | was the worst year yet.                              |
| 6  | Through 2006 and maybe even in 2007 the              |
| 7  | record companies succeeded in making cuts allowing a |
| 8  | minimal return for their stockholders and their      |
| 9  | parent companies. But by the end of the trial there  |
| 10 | is not going to be a shred of doubt that the         |
| 11 | industry is at the end of its rope, that it's        |
| 12 | struggling to come up with a new model that will     |
| 13 | allow it to remain even modestly above water.        |
| 14 | These sales declines of physical product             |
| 15 | simply aren't going to go away and it's hard to keep |
| 16 | making the cuts. You can cut an A&R department in    |
| 17 | half, but it's a lot hader to cut it in half a       |
| 18 | second and then a third time and keep producing the  |
| 19 | quality of recordings that people want to buy.       |
| 20 | Just this month EMI Group announced that             |
| 21 | it was laying off between 1,500 and 2,000 employees. |
| 22 | That's out of 5,500 employees total worldwide. A     |

Page 131 1 company that includes both a major music publisher 2 and a major record company. Where are the cuts 3 coming from? They are all from the record side of the business. An enormous percentage of their 4 overall employment. Even though they have already 5 6 gone through restructuring after restructuring to 7 try to deal with the drop-off in revenues that these companies have experienced. 8 Now, much of this story I realize is not 9 10 unknown to you in the past. And you have heard 11 about it in other proceedings. But I wanted to go through it a little bit because I think it's really 12 13 important to think about the economic situation we 14 are in as you go through the four factors. Let's talk about the four factors. 15 The first one, of course, is maximizing 16 17 the availability of copyrighted works to the public. As to that, what you have to remember is the songs 18 are made available to the public primarily in the 19 20 form of sound recordings produced through the efforts of the record companies. So you can't just 21 raise the mechanical rate willy-nilly and assume 22

Page 132 that's going to create lots of great incentives for 1 songwriters and ultimately benefit the public with 2 the availability of a lot more songs. 3 Songwriters are only rewarded when someone chooses to record a song and when a record company 5 markets and distributes that song and it becomes a 6 The value of a song and the return to 7 hit. publishers and songwriters derives primarily from 8 whether someone chooses to make the record. 9 10 If the Court increases the mechanical rate 11 and adds to the costs the records companies must 12 bear when they create, market and sell recordings, 13 you have to be concerned that there are going to be 14 fewer new recordings and fewer new songs that will be produced and promoted. That, of course, is 15 16 particularly likely when the industry is already 17 contracting for other reasons. 18 In any event, what the evidence will show 19 is that at this moment there are hundreds of 20 thousands of people out there viaing to become 21 successful songwriters. Which is not surprising

because the money to be made as a songwriters at

22

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- 1 this moment if you are successful has never been
- 2 better. The rate is the highest it's every been.
- 3 Not all of them are going to succeed. You are going
- 4 to hear talk about how some songwriters are
- 5 struggling to get by. But it's not as if the money
- 6 is not out there.
- 7 Mr. Cohen said, well, if you cut the
- 8 rates, songwriters are going to disappear, there
- 9 aren't going to be any more songs. He knows that's
- 10 not true.
- 11 Reality is that most of the songwriters
- 12 that are successful in this day and age are the
- 13 singer/songwriters that first of all have multiple
- 14 revenue streams, but they are also the ones who are
- 15 signing these controlled composition clauses that
- 16 Mr. Cohen talked about, clauses in which they agreed
- 17 to cut the mechanical rate below the statutory level
- 18 consistently. So it's not as if there is a need for
- 19 an increase in the rate to keep people involved in
- 20 writing songs and there is simply not going to be
- 21 any evidence to support that supposition.
- How about the second factor, giving a fair

Page 134 return to the publishers and a fair income to the 1 2 record companies. With respect to that, it's 3 important to remember that publishers are already earning these very high, 25, 30 percent margins 4 5 while record companies are barely hanging on. You 6 are going to here a series of witness who work for 7 the publishers and write songs and work for the 8 record companies on the other hand and you will be 9 able to judge who has the more persuasive case on 10 what constitutes a fair return or fair income to 11 each side. 12 But there is really not going to be any 13 question about which party is not earning a fair 14 income right now. It's the record companies. 15 this proceeding is particularly critical to record 16 companies because the vast majority of the revenues 17 that they receive derive from the sales of sound 18 recordings that are subject to the license. 19 A rate increase will affect the vast 20 majority of the revenue generated by the record 21 companies but only a much smaller portion of the 22 licenses granted by the music publishers. So it's

Page 135 critical to the record companies every time they 1 2 make a sale that that mechanical rate affects what 3 happens. 4 JUDGE SLEDGE: So this -- you are saying 5 this factor should not be considered in the context of the 115 license, but should be considered in the 6 7 context of the overall picture of those two parties? 8 MR. SMITH: Well, we certainly do arque, Your Honor, that you should consider all revenues of 9 10 the music publishers that would reward them and the 11 songwriters for producing music and that derive as a 12 result of the producing of music. And certainly in 13 the past the CRT looked at it that way. They get 14 performance royalties, they get sync royalties, they 15 get mechanical royalties all for the songs. 16 JUDGE SLEDGE: Why shouldn't we consider 17 those? 18 MR. SMITH: Certainly under the first 19 factor it's important because it goes to whether 20 they will have availability, maximizing 21 availability. You have to take into account 22 everything that incentivises them to produce the

Page 136 1 songs. JUDGE SLEDGE: It's not clear to me at It's in the context of the 115 license that 3 you consider that. 5 MR. SMITH: But, Your Honor, if there are other things that will give them the same incentive 6 7 that they are receiving as a result of the same activities and the record companies are marketing 8 9 their songs in the form of records, then in trying 10 to decide what level of mechanical royalty you need to set in order to make sure there will be enough 11 12 incentive. You have to look and see what other 13 incentives are pushing in that same direction. 14 JUDGE SLEDGE: I hear your argument. 15 MR. SMITH: That's my argument, Your 16 Honor. 17 Now, the third factor is the relative 18 risks, investment and contribution of the parties. 19 Clearly, those are greater from the side of the 20 record companies for all the reasons I stated. They 21 have risks, they have investments, they have enormous amount of efforts they produce to produce 22

Page 137 those products which are the things that people buy 7 2 and pay for. 3 Our economist Dr. Teece will explain how economic theory in such a situation, even though the 4 5 songwriters and the publishers have a piece of intellectual property they contribute to the 6 7 product, it's to be expected that their portion of 8 the overall revenue will be very, very small 9 relative to the company that participates and invests all of the money required to turn that 10 11 intellectual property into a sellable product. 12 That has to be rewarded as well and that's what economic theory tells you. Most of the money 13 14 has to go to the person along the chain of 15 production that actually contributes all of the 16 efforts, all the investments and has all the risk as 17 well. 18 Certainly that's the fair result of this 19 proceeding and it has to remain a relatively small 20 portion of the overall revenues produced by 21 recordings that go to songwriters and publishers as 22 compared to the enormous amount of money that is

Page 138 needed to compensate the record companies for the 1 2 amount of investment and effort they make. 3 Then there is the fourth statutory factor, 4 which is minimizing disruption. As this Court I think made clear in the SDARS proceeding, it's 5 important in deciding whether you can just impose a 6 7 benchmark rather than adjust it to take into account 8 the impact it will have. 9 Applying that factor here, you have to 10 begin with the fact that the record companies are already experiencing disruption on a scale unknown 11 12 in the history of the industry. The publishers' 13 argument is that the mechanical rate is sufficiently small compared to all the other massive costs that 14 15 the record companies bear that their proposed 16 increase couldn't make things much worse. 17 basically their argument. That I submit is not the 18 way to think about it. 19 Part of the problem being experienced by 20 the record industry is that the mechanical royalty 21 is already disruptively high because it has not been 22 adjusted in the past 8 years to reflect the fact

Page 139 that prices of CDs and revenues from CDs have been 1 2 coming down even as the price goes up, the 3 mechanical royalty goes up. Now, in response to these lower prices and 5 these lower revenues, record companies have been slashing and slashing their budgets with respect to 6 7 almost every other expense that that they bear. 8 only fair way to respond to that royalty is, in this 9 proceeding, is to lower the rate to bring it back 10 into line with the share of revenues that record 11 sales -- the share of the revenue and record sales 12 that was always deemed fair and appropriate for many 13 decades to go to publishes and songwriters, until 14 this present crisis emerged and their share of the 15 revenues shot way up. Let me talk a little bit more about this 16 17 historical understanding of the mechanical rate and 18 the share of revenue the publishers ought to 19 receive, because that understanding is a main 20 component of the analysis of Dr. Teece. He uses the 21 1981 CRT decision and their decision about what kind 22 of a percentage share of revenues ought to go to

Page 140 publishers as a key benchmark in his analysis. 1 2 As I noted, back in 1981 the CRT held that 3 in that one and only prior litigated mechanical proceeding that the rate should go from 2.75 cents 5 up to 4 cents. That was what the CRT ordered. 6 did so primarily because it recognized that record 7 prices had been going up, thereby giving publishers 8 a decreased share of the revenues generated by record sales. The historical relationship was about 9 10 5 percent of retail. But by 1980 with the rising 11 record prices, the rate had fallen to about 3 and a 12 half percent of retail. The music publishers asked 13 for 6 percent. The CRT gave them 4 cents or about 5 percent of retail. 14 15 Now, there is some suggestion that the CRT 16 didn't view this as a percentage, but it's very 17 clear if you read the decision in that case that what they were doing is saying we need to restore 18 19 you to the same percentage share of retail price of a record that you had from the 1950s and 1960s. 20 21 One clear indication is what they said. 22 As the CRT itself put it in the 1981 decision,

Page 141 1 quote, we determined that any adjustment to the rate 2 should and must be directly related to the retail 3 list price of records now and in the future. That's 4 at 46 Federal Register 104, 85. 5 Another clear indication was what they did 6 about subsequent raises in the rates. proposal was that periodically after their decision 7 8 they would get back together, figure out what record 9 prices had done, and then automatically adjust the 10 mechanical rate to match the percentage increase in 11 record prices. That got reversed by the D.C. 12 circuit. So what they did instead is set up a set 13 of steps which were jointly proposed by the RIAA and 14 the music publishers which said they reflect the 15 rate of increase in prices of records. 16 So the whole thing ended up being about 17 what is the share of record prices that we ought to 18 try to maintain. And the decision at the time was 19 it should be around 5 percent. And then we had 20 these to two settlements; 1987, 1997. You saw the 21 same thing. What happened was the parties to those 22 agreements basically said we will keep -- we will

Page 142 tie increases in the rate of increase -- increases 1 2 in the mechanical rate to our anticipation about what we think record prices are going to do. 3 That's what the evidence will show was going on there. 5 Basically, everything was kept in line based on what they anticipated record prices would do. 6 7 But then what happens? Well, what happens is in 2000 everything gets dramatically, starts 8 9 getting dramatically out of whack. With the advent 10 of digital piracy on a large scale as well as a shift away from the small record stores to the big 11 box retailers and the iTunes on-line store, there is 12 13 a significant reduction in what record companies are 14 paid for their sound recordings. 15 Consumer demand drops, there is a demand 16 for digital products, but it's only beginning to make up the difference. It hasn't yet come close to 17 18 doing so. And so both prices and revenues have 19 fallen sharply. 20 But even as CD prices and sales have 21 dropped, the mechanical rate has continued to 22 increase. It is quite a bit, Your Honor. I think

Page 143 it's important to recognize that it was in 1999, 1 which was kind of the peak sales year for the record 2 industry the rate was 7.1 cents per track, but now 3 it's gone up to 9.1 cents per track, which is an 5 increase of 28 percent over that relatively short 6 period of time. 7 What that means, as Dr. Teece will testify, is the mechanical royalty rate as expressed 8 9 as a percentage of the wholesale price of recordings 10 has increased from somewhere around 8 or 9 percent, which is kind of the historical norm, to more like 11 12 13 or 15 percent today. That's what the mechanical 13 royalty has become. 14 Now, we think that that historical relationship between royalty rate and record price 15 16 that formed the basis of the CRT decision and was 17 incorporated into the system through the settlements thereafter is certainly an important basis on which 18 19 you ought to make your decision. 20 It's not just for history sake. It's 21 because that relationship, that understanding, that 22 practice reflects something. It reflects the nature

|    | Page 144   |
|----|--|
| 1  | of the industry; what it is that record companies do |
| 2  | as opposed to what it is that publishers and         |
| 3  | songwriters do. So there is a basic understanding    |
| 4  | that's existed for all these years until things      |
| 5  | started getting out of whack.                        |
| 6  | So how did it start getting out of whack?            |
| 7  | Because nobody saw in 1997 what this decade was      |
| 8  | going to be like in the record industry.             |
| 9  | Our position basically in a nutshell is              |
| 10 | just as rising prices in sales justified an increase |
| 11 | in the rate, declining prices and sales justify a    |
| 12 | decrease in the rate. This really builds off what    |
| 13 | this Court said in the Webcaster and SDARS case.     |
| 14 | The royalties should be related to the price of the  |
| 15 | finished product that consumers are buying, which is |
| 16 | here the sound recording. As those prices go down    |
| 17 | the royalty rate also must come down.                |
| 18 | Our strong preference, of course, would              |
| 19 | would be a percentage rate that accomplishes such    |
| 20 | adjustments automatically. As you will hear from     |
| 21 | Jeffrey Taylor, that is what they use in nearly      |
| 22 | every other country in the entire world. Of course,  |

Page 145 there is a reason for that; it makes sense. 1 2 The whole reason we've seen these 3 dislocations in the past few years is that the rate did not self-adjust. It continued to go up as the 5 price of CDs and recordings went down. If you had such a self-adjusting percentage rate, in some 6 periods it will help publishers, in other periods it 7 will help the record companies. It just depends 9 what prices are doing. 10 Either way it still makes sense, particularly now that we see this other problem, 11 12 which is that there is this huge proliferation of 13 new loans of distribution, and you have CD prices 14 all over the place. Focussing on this mode of 15 distribution problem, if you are not going to use a percentage rate, you are going to use a cents rate 16 17 or a penny rate, you are going to have to start 18 proposing a different rate for every single way in 19 which you can distribute music to the public. You see that in the publishers' rate 20 21 proposals. They have five different proposals, many 22 of which have three subparts trying to take into

Page 146 account all the differences between all the various 1 2 ways in which music is distributed that are subject 3 to the 115 license. The problem, of course, with that approach in addition to how complicated it is to do it that 5 6 way, is you don't know what's going to come along 7 next. There is always some new form of distribution being invented. And unless you have a percentage 8 9 rate, at least a back-up one that could be used as 10 necessary when these modes of distribution come along, there effectively isn't a compulsory license 11 12 because there is simply no way to determine what the 13 right rate should be for some mode of distribution 14 when it comes along between the proceedings of this 15 Court. So we think the percentage rate ought to be 16 very, very seriously considered. 17 I would add that unlike DiMA we prefer a 18 rate based on a percentage of wholesale prices 19 rather than based on retail prices. And the reason 20 for that is that the concept of the retail list 21 price has somewhat lost some of its meaning in the 22 current world and it's very hard to see how you can

Page 147 do a rate based on actual retail prices. 1 You have 2 to gather market information from every place where 3 recordings are being sold. So that's why you are going to hear us 4 5 talking a lot about how you should use a percentage 6 of the wholesale price which is a piece of data that 7 you can easily get ahold of. And that's basically 8 what's done around the world. 9 Even more important than going to a 10 percentage rate is recognizing the rate has to go 11 down not up. This Court can't ignore the windfall 12 that's fallen into the hands of the publishers and 13 there is no earthly reason why they should be 14 receiving such a high percentage today of the 15 wholesale revenues of the record industry, more than 16 they have ever received in human memory, 17 particularly when the record industry is struggling 18 to survive and is still undertaking the lion share 19 of investment from which publishers benefit and is 20 being called upon as well to investment many 21 millions of dollars in the digital deliver 22 technology, because it's the only hope to save both

Page 148 industries. So we are proposing a decrease in the 7 2 royalty rate to restore the balance that existed 3 from 1981 to 2000, and indeed long before that. Now, as I note in Dr. Teece --5 JUDGE SLEDGE: Let me ask you about that. I thought you said the balance in the '50s and '60s 6 7 was 5 percent and later you said the historical 8 balance was 8 percent. 9 MR. SMITH: Your Honor, that's because I 10 shifted in the conversation from percentage of 11 retail to percentage of wholesale. The 5 percent 12 was a percentage of retail back in 1981. We prefer 13 a percentage of wholesale. You have to make a conversion. And Dr. Teece does that conversion and 14 15 he comes out supporting the 7.8 percent wholesale. 16 There is a variety of ways in which you can do that. 17 They all come out in the range of 7 to 10 percent of 18 wholesale, and if you are using that 5 percent of 19 retail as your basis. And there is going to be a 20 fair amount of discussion at the trial of exactly 21 how that conversion should have been done. You saw 22 some of that in the motion in limine that was filed

Page 149 by the publishers and songwriters. But it basically 1 2 comes out into that range, which is substantially 3 lower, as I have said, from the 13 to 15 percent 4 that we are paying now. 5 Dr. Teece also will explain how the 1997 6 settlement can be used as separate benchmark if you 7 want to. Basically, it comes out at about the same 8 thing. As I said, these settlements essentially 9 tried to maintain the same relationship between the 10 price of recordings and the mechanical rate. 11 Now, if any further adjustment is needed 12 from using those benchmarks, as Dr. Teece explains, 13 and as we will argue, it is downward not upward. 14 After all, one has to take full account of the 15 current remarkable profitability of the publishing 16 industry at a time when the record industry is 17 struggling to survive. 18 As I noted at the outset, our proposal is 19 also supported by international comparisons. 20 U.S. has moved from having the lowest mechanical 21 rates in the world in 1981 to having among the 22 highest rates now. For example, in the most

Page 150 comparable countries, the UK and Japan, rates are 1 2 now much lower. Canada also recently adopted 3 on-line mechanical rates lower than the current U.S. download rates. And even the rates in Continental 5 Europe, which historically have been among the highest in the world, are now lower than the U.S. 6 7 rate on a percentage basis. 8 We will be providing all those details, 9 assuming we are permitted to after you have ruled on 10 the motion in limine, principally through our 11 witnesses, Jeffrey Taylor and Richard Boulten, who 12 have expertise in rates that are charged around the 13 world. I would pause since Mr. Cohen discussed 14 15 the motion in limine momentarily to note that 16 clearly international rates are relevant, there are 17 factors that require you to consider what's a fair return, what other countries have determined to be a 18 19 fair return and a fair rate sort of ought to be considered as something that ought to be relative. 20 21 The CRT so concluded in 1981 and the D.C. circuit specifically ruled that was appropriate evidence to 22

Page 151 be considered under the Section 801(b) factors. So 1 2 we have law to apply with respect to that argument. Obviously, you have a great deal of discretion over 3 how much weight you want to give it, but it ought to be in evidence as something you have available to 5 6 you as a comparison. 7 JUDGE SLEDGE: Are you suggesting that 8 evidentiary rulings are precedent? 9 MR. SMITH: Your Honor, this goes to -- I 10 quess if you characterise it as evidentiary, that 11 might be an argument. It seemed to us what the D.C. 12 circuit was really saying was how do you understand 13 Section 801(b). Is this evidence something that would be relevant under the 801(b) factors, and you 14 15 might treat that as not so much a pure evidentiary 16 ruling but more of an analysis of the substance of 17 the statute. MR. WISNIEWSKI: The D.C. circuit didn't 18 say it had to be considered, did it? 19 MR. SMITH: No, Your Honor. It said --20 our proposal is to apply the 7.8 percent percentage 21 22 rate across the board to CDs, to permanent

Page 152 1 downloads, to limited downloads, to ringtones, as 2 well as any other method of distribution that may come along. There is one exception. I hesitate to 3 bring it up, but in light of the conversation this 5 morning I guess I will. It is the interactive streaming that doesn't involve the creation of a 6 7 permanent copy with the customer. Our understanding is that any -- we will 8 9 see what the evidence ultimately shows, but 10 certainly our understanding is that interactive 11 streaming of that kind to the extent it involves 12 making of copies of the song, of music at all, 13 involves copies that are essentially like the ones 14 that are covered by the Section 112 ephemeral 15 They are transitory copies that are used 16 along the way in the process of distribution. 17 We think those copies ought to be priced 18 and they are covered by Section 115, we have an 19 agreement with the publishers to that effect. 20 don't have any disagreement with your handling the 21 issue here. But we didn't think the price ought to 22 be very high.

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| 1  | When you are talking about an interactive           |
| 2  | stream, the primary right at stake is a performance |
| 3  | right, it's not a reproduction right. And the       |
| 4  | performance right is taken care of through an       |
| 5  | entirely aspect. That's through the ASCAP and VMI   |
| 6  | system. So while there are some copies apparently   |
| 7  | that are made in this process, the technology is    |
| 8  | complicated but there are these transitory copies,  |
| 9  | you can't really rationally pay very much for that. |
| 10 | Our proposal is that the payment be only a very     |
| 11 | small fraction of what the performance royalties    |
| 12 | are, just a small fraction based on what the        |
| 13 | performance royalties happen to be set at.          |
| 14 | What does the NMPA say about this? All of           |
| 15 | the others I've been talking about are only         |
| 16 | arguments I have been talking about about why the   |
| 17 | rate needs to go down and why                       |
| 18 | JUDGE SLEDGE: Let me ask you before you             |
| 19 | leave that last point, the rate that you are        |
| 20 | proposing for interactive streaming that is subject |
| 21 | to 115, is that a rate for a general DVD or is that |
| 22 | an intermediary?                                    |

Page 154 MR. SMITH: It is a rate for services 1 2 which don't deliver a downloaded copy to the user, 3 that merely are interactive streams. They are like 4 the streams that were at issue in Webcaster except 5 they are interactive. 6 JUDGE SLEDGE: I said intermediary. I should have said incidental. 7 8 MR. SMITH: I'm sorry. Our understanding 9 is that they are incidental, that they are ephemeral 10 and that's what our rate reflects. 11 JUDGE SLEDGE: Is that what your 12 presentation says, that there is an incidental --13 MR. SMITH: I don't use that word 14 specifically, but it is certainly essential to our 15 argument for a very low rate is that there is no 16 product, you simply hear the song that one time, and 17 any copies along the way are comparable to the 18 ephemeral Section 112 copies. 19 JUDGE SLEDGE: Why did you choose not to 20 use that? The statute requires us to set that. 21 MR. SMITH: I'm sorry. 22 JUDGE SLEDGE: I don't think you did.

Page 155 MR. SMITH: There is a reference to 1 2 incidental in the statute. 3 JUDGE SLEDGE: Yeah. And I think the only reference in your direct case is there is a term 4 5 that defines it. But it's not in your proposal is 6 it? 7 MR. SMITH: I don't know that we used the term there. Essentially, that is our argument, that 8 9 these are incidental copies. 10 JUDGE SLEDGE: I was curious. 11 MR. SMITH: We could certainly make that 12 position more clear as the case goes on. Sorry if 13 that wasn't made as clear as it could have been in 14 our initial filings. 15 Now, what is the NMPAs response? What's 16 interesting is while there was a lot of discussion 17 about how you shouldn't set a percentage rate, 18 nobody in this proceedings disagree with the 19 proposition what you really ought to be doing is try 20 to establish the right relationship between record 21 prices and the mechanical rate, that there needs to 22 be a percentage relationship that this Court ought

Page 156 to use to analyze the reasonableness of any rate. 1 2 That is precisely as Mr. Cohen laid out 3 and what Dr. Landes for their side says you should 4 do just like Dr. Teece does; that there should be a 5 percentage. The only real disagreement is about 6 what the percentage should be. Admittedly, the 7 publishers are not arguing for a percentage rate, 8 but they are arguing for a penny rates but they 9 analyze them by virtue of this percentage analysis 10 that you saw presented by Mr. Cohen reflected by 11 this range of reasonableness under tab 11 of his 12 presentation. That's a percentage analysis. The 13 only real key difference is that it's much higher 14 percentages than the ones we proposed. 15 Essentially, what Dr. Landes says is that 16 the percentage you should use is not the historical 17 one of around 8 or 9 percent of wholesale, it's not 18 the current unanticipatedly high one of around 13 to 19 15 percent of wholesale, it's a much higher range of 20 reasonableness, at least according to him, one that 21 starts much higher than 15 percent. I don't want to 22 give that figure because I think it's based on the

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| 1  | ringtone agreements and apparently we are not going  |
| 2  | to say that number out load today. But it starts     |
| 3  | much higher than 15 percent and goes all the way up  |
| 4  | to 50 percent of wholesale. So it is an              |
| 5  | extraordinarily high rate that he would justify      |
| 6  | under this analysis.                                 |
| 7  | How does he get there? Well, before we               |
| 8  | talk about his benchmark analysis, let me talk about |
| 9  | two other arguments that the publishers and the      |
| 10 | songwriters have presented here today or will be     |
| 11 | presenting in this case as reasons why the rate      |
| 12 | despite everything that we have going on in the      |
| 13 | music industry needs to get jacked way up again.     |
| 14 | The first of the arguments they make is,             |
| 15 | this is going to be in witness after witness, is     |
| 16 | this notion that somehow the publishers and the      |
| 17 | songwriters have a right to be compensated by the    |
| 18 | recording industry for the down-turn in the sales    |
| 19 | and prices of recordings. This is where the heads    |
| 20 | we win, tails you lose really kicks in.              |
| 21 | The publishers were very happy to be our             |
| 22 | partners when all the boats were rising together.    |

Page 158 But now they want us, the record companies, to 1 2 quarantee that they won't experience a reduction in 3 the mechanical revenues at a time when the record industry is struggling to keep its head above water 5 and the publishers are already earning massive 6 profits. 7 Now Mr. Cohen acknowledged that piracy has 8 had a severe impact on all parties. But what's the 9 response that they give to that severe impact on all 10 parties? Their argument essentially is as the pie 11 shrinks, they should get a larger and larger share 12 of that smaller pie. The argument has no end except 13 the argument would be as the pie gets very, very 14 small they should get all the money because 15 basically they should be compensated by the record 16 companies for the shrinking sales and profits, the 17 shrinking sales and prices of CDs regardless of the 18 fact that the record companies themselves are 19 suffering exactly the same severe impact that they 20 are suffering. 21 Then there is this intrinsic value 22 argument; the argument that there should be an even

Page 159 higher rate set for digital distribution than for 1 2 They basically are arguing that digitally 3 distributed copies of music are more valuable to consumers even though nobody is paying any more for 5 The CD may cost the consumer about 12 bucks, them. but the same album delivered through iTunes costs 6 7 only 9.99. But the publishers still say the desever 8 an even greater share of the revenues on digital 9 downloads of digital albums than on CDs because 10 digital deliver is, quote, more valuable. 11 That obviously doesn't make any sense. 12 You can't start talking about the value of products 13 independent of what they are selling for in the 14 marketplace. Everyone may have their opinion about 15 the inherent value of some product or other, but 16 royalties have to be based on what revenue is being produced by those products. And even if some 17 18 consumers perceive downloads as more desirable than 19 CDs, that simply doesn't imply that publishers deserve a larger share of the revenue being paid for 20 21 those downloads. That's the essence of the four 22

statutory factors which focus on what portion of the

Page 160 revenue actually generated by recordings ought to go 1 2 publishers and songwriters to provide them their 3 fair return, maximize worth, reflect relative contribution of all involved. 4 Now, I want to talk, if I could now, how 5 we get this range of reasonableness that Dr. Landes 6 7 uses, the range reflected under Tab 11. 8 end of the range, which I can talk about in public, 9 of course, is 50/50; the argument that they should 10 get half of all the monies paid to record companies 11 for the contents of these recordings. That would be 12 perfectly reasonable according to Dr. Landes. 13 forms his position on this wide band of so-called 14 reasonableness. 15 As Mr. Cohen pointed out, the only support 16 they have for the notion that it would be perfectly 17 appropriate to divide up the money 50/50 is the sync 18 rights market. And that's an old favorite in this Whenever anybody comes into this Court and 19 20 wants to claim that they should get a much higher 21 share of the revenue at the expense of the recording 22 industry, what they start talking about is the sync

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| 1  | rights market. The market for using recorded songs   |
| 2  | in TV and movies.                                    |
| 3  | Where it's true, the evidence will show              |
| 4  | and has shown in prior proceedings, in that          |
| 5  | particular context typically what happens is the     |
| 6  | music publisher and the record company share equally |
| 7  | in the revenues that are produced by that particular |
| 8  | license. Now, the reliance on this has occurred      |
| 9  | consistently. We had in the webcasting case where    |
| 10 | the webcasters said we shouldn't have to pay record  |
| 11 | companies more than they pay music publishers; that  |
| 12 | somehow sounding recording and musical works rights  |
| 13 | ought to be valued the same. This Court flately      |
| 14 | rejected the argument. It happened again in the      |
| 15 | SDARS proceedings where Dr. Woodbury, the expert for |
| 16 | the satellite broadcasters, said that what they paid |
| 17 | for musical works ought to be a cealing, an upper    |
| 18 | bound for what they have to pay for the sound        |
| 19 | recording rights. This Court rejected the argument   |
| 20 | again.   |
| 21 | This Court has consistently ruled that the           |
| 22 | marketplace shows that what the value of sound       |

Page 162 recording rights is is many multiples of the value 1 2 of the musical works rights. Pointing to sync rights doesn't make that reality go away. 3 reason is in part precisely what Mr. Cohen pointed 5 to. When you go to sell sync rights, at that 6 7 point in the process the leverage of the sound 8 recording company is much less than the leverage of the publishing company. They have to buy a 10 copyrighted song. There is no way around that. They may have choices about which song to have, but 11 12 they have to pay a sync rights payment to some 13 publisher or multiple publishers for some song. 14 they don't have to pay a nickel if they don't want 15 to for a recording. They can make their own, and 16 they frequently do. 17 So there is this huge disparity in that 18 situation in the leverage that exists between the two industries that doesn't exist in any other 19 20 context. So I submit to you that the upper end of 21 this range of 50 percent is a complete non-starter 22 based on everything this Court has already heard

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- 1 about that argument and the prior arguments that
- 2 have been made and the evidence that will be
- 3 presented here as well.
- 4 There is another benchmark that Dr. Landes
- 5 uses that Mr. Cohen didn't mention today that is
- 6 sort of the middle of his range, the Audio Home
- 7 Recording Act which is a statute and has a subsidy
- 8 that pays \$2 to the record companies for every one
- 9 dollar that is paid to the music publishers.
- 10 Obviously, that's not a market benchmark at all and
- it doesn't make sense to say that just because
- 12 Congress picked some ratio in handing out money to
- people as a legislative compromise back in the 1980s
- 14 that you ought to decide that's the market rate for
- 15 anything in 2008.
- Then there is the low end of the range,
- 17 the number that I'm not saying out loud today. That
- 18 is derived by Dr. Landes from his analysis of the
- 19 ringtone agreements. You will be hearing a great
- 20 deal about ringtones in this trial, and whether or
- 21 not they pry a meaningful benchmark on which you can
- 22 set the prices for all mechanical royalties. But

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| 1  | there are many reasons why we think this is not a    |
| 2  | particular useful benchmark for you to rely on.      |
| 3  | First of all, ringtones are a new and very           |
| 4  | small segment of the market for recorded music. I    |
| 5  | think the figures are something around 5 percent.    |
| 6  | And they involve a very different kind of consumer   |
| 7  | market than the market for the distribution of music |
| 8  | that people can actually listen to. A ringtone is    |
| 9  | not a substitute for a CD or for a download. The     |
| 10 | consumer only gets the snippet of sounds which is    |
| 11 | then used not to be listened to but to make you know |
| 12 | you are supposed to answer your phone.               |
| 13 | So, oddly, at the same time consumers pay            |
| 14 | two to three times for that snippet what they pay    |
| 15 | for full downloads of the same song. Given those     |
| 16 | disparities, any lessons to be drawn from the        |
| 17 | ringtone market case have to be drawn very           |
| 18 | cautiously. At a minimum you would have to make      |
| 19 | some suitable adjustments for the very different     |
| 20 | economics of that particular market if you are going |
| 21 | to use it as a benchmark for deciding what the       |
| 22 | mechanical royalities ought to be on music that is   |

Page 165 being sold to be listened to not to be put on a 1 2 telephone. 3 JUDGE SLEDGE: I thought the purpose of 4 ringtones was to aggravate everyone around you. 5 MR. SMITH: I think it's kind of showing 6 off, Your Honor. It's a bit of a novelty product. 7 But I think it's important to note that 8 Dr. Landes doesn't make any adjustments. A range, 9 by the way, which I think I've already established, 10 everything above that bottom end there isn't any 11 support for. 12 The second problem with their reliance on 13 the ringtone benchmark is the rate was originally 14 set as a percentage of retail at a time when 15 ringtones were not actually recorded music but were so-called mono-phonic or poly-phonic ringtones. 16 played the tune but didn't sound like the record. 17 18 At the time there wasn't any record company 19 involvement in the negotiation of these deals. They 20 were simply direct license deals between the 21 publishers and a whole variety of little tiny 22 companies that were trying to sell ringtones. You

Page 166 are going to see hundreds of those deals with 1 companies no one has ever heard of, but they did 2 establish a percentage of retail that was 3 essentially the going rate in those agreements. 4 5 But that does not end up showing up in Dr. 6 Landes's analysis. Instead what he wants to do is 7 use a percentage of wholesale which shows up only when there is master tones involved which is the ringtones of the actual recordings. And what 9 happened when master tones came along was there were 10 these NDMA agreements, new digital media agreements, 1.1 and you end up with a percentage of wholesale figure 12 13 in there going to the publishing companies for the 14 musical works rights and it is essentially just a 15 conversion of the retail percentage that was 16 negotiated previously for the polyphonic and 17 monophonic ringtones. Essentially the publishers said we are not going to take a lesser percentage, 18 19 so you have to give us that same percentage of 20 retail and we are going to insert in the agreement an equivalent percentage of wholesale. Essentially 21 22 it's the exact same number. Because if we just did

Page 167 the calculation based on what wholesale is as a 1 2 percentage of the retail, you will end up just doing 3 that conversion. But the problem then is if you use the 4 5 percentage of wholesale in those agreements and try 6 to take it to other contexts where the relationship 7 between wholesale and retail is very different, you end up distorting things. For example, if Dr. 9 Landes simply used percentage of retail negotiated 10 in the ringtone agreements and applied it to other 11 contexts, the result would have been that the price 12 shouldn't go up at all for mechanical or some things 13 or should go up only modestly. He doesn't do that. 14 He uses the wholesale percentage that was negotiated 15 because that justifies, he says, a massive increase 16 in mechanicals. Basically an artifact of the fact 17 that the split between wholesale and retail is 18 different in those other markets. 19 The third problem with using the ringtones 20 and particularly this wholesale percentage, is that, 21 is the circumstances of the negotiations of those 22 VMA agreements, and in particular the fact that they

Page 168 are package agreements. There were a whole bunch of 1 2 different things being negotiated at the same time. 3 What the evidence will show is that in turn for 4 giving a percentage of wholesale, a percentage of 5 retail to the publishers that was agreed to in those 6 deals, the recording industry received a whole slew 7 of very valuable rights. In return for accepting that percentage, for example, they got the right to 8 9 start distributing videos digitally which they 10 didn't have before. They got the right to distribute DVDs and other physical products with two 11 12 versions of the song on them and only pay a sigle 13 mechanical rate. Which was a big matter, instead of 14 having to pay twice. There were a variety of 15 concessions made by the music publishers in return 16 for the particular ringtone rates that they received. So it's very hard --17 18 JUDGE SLEDGE: Are those concessions part 19 of the agreement? 20 MR. SMITH: Yes. They are all in the same 21 agreement. It's a package deal. The evidence will 22 show it was viewed as a package deal by both sides,

Page 169 that no one aspect of those deals could be viewed in 1 2 isolation. This doesn't require you to look at 3 anything besides the agreements themselves. 4 Given that package aspect of the deals, 5 it's just very hard to say what the market rate for 6 master tones royalties would have been on its own. 7 It's simply unknowable given that that's how it came 8 about. And especially given that the ratio -- I 10 guess that's hard to say. 11 Now, one more point about ringtones. 12 this is an important one. Even if you think that is 13 a valid benchmark, every single rate request that the publishers and songwriters have made here is 14 above that benchmark. If you look at tab 11 in Mr. 15 16 Cohen's presentation, the ringtone benchmark is at 17 the bottom end of the range of reasonableness. 18 Every single one of the rate requests is above that. 19 Clearly they are overreaching if that is all they 20 have to rely on. Indeed, Mr. Cohen said that the 21 ringtone proposal is supported by the ringtone 22 agreements. But in fact the ringtone proposal they

Page 170 make is massively higher than what the rate is that 1 2 has been agreed to in the ringtone agreement. 3 So ultimately at a minimum you can't, even using their best evidence, which is these ringtone 4 5 agreements, even using that you can't support what 6 they actually request. It simply doesn't match up. 7 Now, having talked a little bit about Dr. Landes's benchmarks, one of the things you are going 8 9 to hear discussion about at the trial is the stuff 10 he didn't use. We are going to be asking him why he 11 didn't look at what the price is in the marketplace 12 for the first use of a song on a recording. The 13 first use, the first time that song is recorded it's 14 not subject to a compulsory license. That's 15 voluntarily negotiated in the marketplace. 16 The reason Dr. Landes didn't use that is 17 because that price is consistently at or below the 18 statutory rate that we now have. So that wouldn't 19 have done him any good as a market benchmark. 20 will also be asking Dr. Landes about these 21 controlled composition clauses in which 22 singer/songwriters have consistently agreed to lower

Page 171 the mechanical rate as part of the deal with the 1 2 recording industry, so that there are very direct 3 potential market benchmarks much more relevant I 4 submit than the ringtones and the sync rights and 5 the Audio Home Recording Act that form the basis of 6 Dr. Landes's analysis. 7 Ultimately, the choice before this Court 8 is whether to adjust the rate to restore the 9 long-standing relationship between record prices and 10 mechanical royalties or instead to distort that 11 relationship even more than it's already been 12 distorted by the events of the last eight years or 13 so, as CDs prices have come down and the rate has 14 continued to go up. 15 Now, we submit there is absolutely no 16 reason to follow the later course, especially given 17 the extraordinarily thin evidence that the 18 publishers rely on here, their so-called market 19 benchmarks. The publishers and songwriters are 20 already getting a higher share than they received in 21 living memory. Far from justifying a further 22 increase, the evidence will show the only rational

Page 172 way to go is bring things back into line, restore 1 2 the ratio between record prices and mechanical royalties that prevailed for many, many years up 3 until the current upheaval began. 5 Thank you for your attention and I 6 appreciate in advance your patience with us as we go 7 through this process. JUDGE ROBERTS: Mr. Smith, before you finish, there is another aspect to your proposal 9 10 that you haven't mentioned, and that's terms. 11 my first observation about the request that you have made for terms is that you ask us to amend the 12 13 Copyright Office's regulations which are at 201.18 and 201.19 of 37 CFR. I think we have been down 14 15 this road before about this board amending terms of 16 the Copyright Office and you are aware that we are 17 not going to be doing that? 18 MR. SMITH: Yes, Your Honor. These things 19 were obviously put together some time ago. 20 JUDGE ROBERTS: Yeah. My second, more 21 significant, is that indeed the Register has adopted these terms in 201.18, 201.19 according to a 22

Page 173 provision in the statute, and it appears at 1 2 115(c)(5), yet, nevertheless, the statute tells us 3 earlier at 115(c)(3)(c) that we are to establish reasonable rates and terms. 4 And my question to you is given the fact 5 6 that the Register has exercised her authority and 7 come up with terms for payment to which you are asking for some amendments, what authority do we 8 9 have to alter or come up with additional or contrary 10 regulations to what the Register has already adopted. 11 12 MR. SMITH: It seems clear to me you have 13 the authority at a minimum to come up with 14 additional terms. I don't see that creates any 15 contention with the regulations. With regard to 16 whether or not the statute anticipates you actually 17 changing the terms, I actually don't know what our 18 position is on that, Your Honor. This is not 19 something I've ever focused on until this moment. 20 If I can plead unprepared in class today, that's my 21 position.

JUDGE ROBERTS:

2.2

I noticed, Mr. Cohen, you

Page 174 had also asked for some terms and you mentioned one 1 of yours in your opening statement. 2 3 MR. COHEN: Yes. JUDGE ROBERTS: Do you have anything to 5 add here? 6 MR. COHEN: We are operating under the assumption that because of 115(c)(3), you have the 7 8 right to adopt terms, as set out directly. 9 JUDGE ROBERTS: What about 115(c)(5) where 10 it directs the Register to adopt terms related to 11 payment? What you are asking for is a late fee 12 which relates to payment. 13 MR. COHEN: Well, the consequence is a, 14 it's not a term. It's an additional term. I don't 15 see the inconsistency between our position and 16 (c)(5) instructs when the payment should be 17 made, but it says nothing about the consequences of 1.8 failure to adhere in terms of late payments. 19 JUDGE ROBERTS: You have some other term 20 provisions too, do you not? 21 MR. COHEN: I believe that we do, but 22 again, I have to say that again we will come back

Page 175 and try to answer your question about the authority 1 2. question. It's not something --JUDGE ROBERTS: I definitely think we 3 need to have some agreement. 4 5 MR. COHEN: I understand and we are 6 prepared to deal with that. 7 MR. SMITH: We would be happy to file a 8 brief with you if you would like, Your Honor. Thank 9 you very much. 10 JUDGE SLEDGE: All right. Mr. Laguarda. 11 JUDGE ROBERTS: Before you start, Mr. 12 Laguarda, I just want to mention I was not leaving 13 you out but I noticed in your proposal you really 14 don't propose terms, you have a definitional 15 provision with respect to incidental phono records I 16 believe. But you can certainly be more than welcome to submit any thoughts you had on our authority to 17 18 adopt terms. 19 MR. LAGUARDA: Thank you. 20 JUDGE SLEDGE: You are right. I think I 21 gave Mr. Smith credit for having that in his terms. 22 But convenience terms can take away the --

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| 1  | MR. LAGUARDA: I'll gladly take it. Thank            |
| 2  | you, Your Honor. May it please the Court, my name   |
| 3  | is Fernando Laguarda, and I represent the Digital   |
| 4  | Media Association. With me today, if I can point    |
| 5  | out, my partner Tom Connolly, Chad Breckenridge and |
| 6  | Kelly Shields, and also in the courtroom, DiMA's    |
| 7  | general counsel, Lee Knight.                        |
| 8  | Thank you for your time and attention this          |
| 9  | afternoon. I want to start with a simple but maybe  |
| 10 | provocative observation. Copyright owners should be |
| 11 | compensated fairly for digital phono records        |
| 12 | deliveries under Section 115. I want to repeat it.  |
| 13 | Copyright owners should be compensated fairly for   |
| 14 | digital phono record deliveries. There are a lot of |
| 15 | questions as to how to do that the way Congress     |
| 16 | intended, and many contentious issues that have     |
| 17 | already arisen in these opening statements.         |
| 18 | This proceeding will attempt to wrestling           |
| 19 | with them. But every party here agrees on some      |
| 20 | fundamental points. First, everyone agrees there    |
| 21 | have been sweeping changes in the music industry in |
| 22 | the past decade. Everyone agrees these changes have |

Page 177 affected copyright owners and copyright users, music 1 2 providers alike. And everyone agrees that 3 traditional sales and revenues are down. And no 4 surprise, everyone agree that piracy is the big 5 problem. Its severe impact, as Mr. Cohen remarked, is hurting everyone. 6 7 And I would submit that everyone agrees 8 there is only one solution to the problem. And that 9 is encouraging investment and expanding the market 10 by offering consumers what they want, which is 11 digital music and innovative music services at an 12 attractive price. As Mr. Faxson will testify, the 13 availability of innovative digital music services is 14 probably the greatest bullwork against piracy that 15 the industry has. 16 It's a good thing for digital music 17 services to grow. DiMA companies are the solution 18 to the problem that everybody has been talking 19 Through our innovation, through our 20 investment, and through our undertaking of risk we 21 are growing the pie for copyright owners and 22 How can we do this? Getting consumers consumers.

Page 178 what they want when they want it, and they can get 1 2 it elsewhere for free, and making sure that copyright owners are fairly compensated isn't easy. 3 DiMA has always believed that consumer choice is 4 always the best antidote to piracy. We make 5 millions of copyrighted musical works available to 6 7 paying customers in a way that isn't possible in the 8 physical world, permitting the public an opportunity 9 to obtain works they otherwise would not have 10 purchased and may not even be available elsewhere 11 and pay royalties to songwriters. 12 You go into a traditional retail 13 environment to buy music today, Wal-Mart, Best Buy, 14 Circuit City; these are not music stores. The music 15 store, the Tower Records of the world, have gone 16 Where can consumers go to buy music? 17 to digital companies like DiMA members, who have 18 sold billions of songs, who have sold millions of 19 Subscription services make catalogs of 3, 20 upwards to 5 million songs available to consumers, 21 over 200,000 artists available at the click of a 22 button.

|    | Page 179   |
|----|--|
| 1  | The range, the depth, the breadth of the             |
| 2  | offering is unparalleled in the physical world and   |
| 3  | all of it is competing with piracy and all of it     |
| 4  | requires investment to make possible.                |
| 5  | DiMA companies have invested tens of                 |
| 6  | millions of dollars to make musical works available  |
| 7  | to paying customers. We don't dispute the song is    |
| 8  | important, and we don't dispute the recording is     |
| 9  | important. But this Court needs to recognize that    |
| 10 | taking a song and selling it to a consumer requires  |
| 11 | millions and millions of dollars of fixed costs and  |
| 12 | ongoing costs to facilitate the consumer             |
| 13 | interaction, digitizing the song, ensuring that it   |
| 14 | complies with all copyrights, making sure that       |
| 15 | copyright owners are going to get paid, keeping      |
| 16 | track of all of the different owners, taking care of |
| 17 | all of the different complicated licensing           |
| 18 | requirements, having the servers, the back-up        |
| 19 | capacity, engineering Web sites that consumers find  |
| 20 | attractive, ensuring there is a way for them to find |
| 21 | music they like, recommending music to them so that  |
| 22 | they buy more. All of that requires cost and         |

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- 1 investment.
- 2 And educating consumers they can buy
- 3 digitally is hard. Customer retention and
- 4 acquisition in this business is hard. In the
- 5 meantime all of our companies are complying with a
- 6 multitude of legal requirements to ensure that
- 7 copyright owners get paid and paying millions of
- 8 dollars in royalties.
- 9 And one thing that is important for the
- 10 Court to remember, despite the success of some
- 11 companies, this is a nascent industry. Economic
- 12 conditions here are not established. Lest everyone
- 13 get excited about jumping into the copyright royalty
- 14 pool, we need to understand the reality of the
- 15 marketplace.
- 16 It has taken millions of dollars to invest
- in and get these businesses going, and the ones that
- 18 are getting off the ground need to constantly make
- 19 more investment. The difference between stolen
- 20 music and the music that we offer is not just the
- 21 deterent affect of suing pirates. We have no qualms
- 22 about the amount of money spent to sue pirate sites.

Page 181 Consumers value the experience they get on our 1 services because of the investment and the enormous 2 cost that we have expended to make those services 3 attractive. 5 Now, the rates and terms that DiMA is 6 proposing are consistent with existing economic conditions and the statutory objectives. 7 8 relying primarily on three benchmarks. 9 The first is a 2006 license from the 10 United Kingdom involving the same parties 11 essentially that are before the Court now for 12 essentially the same uses, the United Kingdom being 13 one of the more important digital markets, and the 14 rate is on the high end we believe because it 15 includes rights beyond the reproduction and 16 distribution right that is at issue here. 17 And also, most likely, because it was 18 negotiated in a context in which users have the 19 burden to prove the reasonableness of a rate, if they were to go before the copyright authority in 20 21 the United Kingdom. And you will hear testimony

22

about that.

Page 182 We also look at and draw from the 1981 1 2 decision of the copyright royalty tribunal, 3 appropriately so, as the recording industry does as That decision well, as you heard from Mr. Smith. 5 was based on a predictively growing market, importantly on the ability of market participants to 6 7 raise prices and importantly with stable players. 8 All of that has changed since then. there is also some evidence that we will have in the 9 10 record about licenses between publisher and digital 11 music companies as well to provide some indication 12 of marketplace transactions. 13 All of that informs our proposal. 14 what is important here is to meet the statutory 15 objectives this Court must encourage investment, not 16 discourage it. Competition with piracy is just the 17 first hurdle in making a successful digital music 18 service available to the public. And you will hear 19 from witnesses in that regard. John Potter, the executive director of DiMA, will provide an overview 20 of digital music industry, and industry efforts to 21 22 battle piracy and grow successful services.

|    | Page 183   |
|----|--|
| 1  | Eddy Tu, the head of Apple's iTunes store,           |
| 2  | will explain the business of selling digital music,  |
| 3  | the competitive challenges that are faced, and the   |
| 4  | importance of setting rates that do not discourage   |
| 5  | necessary additional investment. You will also hear  |
| 6  | witnesses from subscription services; Ellen McGlay   |
| 7  | of Music Net and Tim Court from Rapsody, who will    |
| 8  | explain that business model, the value they add to   |
| 9  | consumers by making available millions of songs and  |
| 10 | hundreds of thousands of artists and the competition |
| 11 | they face and the investments that they have made    |
| 12 | and continue to make.                                |
| 13 | The goal of these companies is to change             |
| 14 | the way people think about consuming music, and it's |
| 15 | not easy. You will also will hear from the           |
| 16 | perspective of AOL, Kyle Johnson, talk about AOL's   |
| 17 | entry and exit into the subscription music           |
| 18 | marketplace and the challenges of keeping customers, |
| 19 | attracting them and importantly keeping them, and    |
| 20 | why AOL decided that this market is so hard, they    |
| 21 | had to get out.                                      |
| 22 | And, finally, you'll hear the testimony of           |

Page 184 Megan Calvert, our expert economist, who will 1 2 examine the benchmarks and provide her opinion about how in light of the marketplace evidence what a 3 reasonable range of rates should be. 4 5 I want to emphasize in all of that, with all of our witnesses, with all the witnesses that 6 you'll here, from the copyright owners, the 7 songwriters, publishers and the record companies, 8 9 there is no dispute about piracy hurting copyright 10 owners and songwriters in particular, placing downward pressure on retail price, making it harder 11 12 for market participants. There is no dispute. You will not hear a 13 14 witness challenge the importance of technological 15 investment, the importance of internet distribution to benefit copyright owners. The decline in 16 17 mechanical rates, if there has been one, as the copyrights owners attempt to argue, has been and 18 19 will be and can be offset by the powerful positive

impact of technology on the creation of new music.

That's not my opinion. That's the opinion of

20

21

22

Professor Landes.

Page 185 1 And, finally, no one will dispute that what matters here is getting paid. With all due 2 3 respect and admiration for the work of songwriters, the very important work and calling, songwriters 4 want to get paid, publishers want to get paid, 5 6 labels want to get paid, and respectfully, my 7 clients want to get paid. All of that depends on the consumer paying. And you will hear testimony 8 9 about that. 10 The copyright owners I want to comment on 11 briefly. Because I think it betrays fundamental 12 misconceptions about what this proceeding must 13 accomplish. 14 First, the copyright owners argue that 15 because piracy hurts them, the product that we sell 16 should cost more to produce. That's their argument. 17 This is counter-intuitive, and it's a death spiral 18 for the industry. 19 Second, how much more should those costs 20 go up? Well, the copyright owners argue everything 21 justifies an increase. Perhaps there is no limits 22 to the recommendation. They suggest that 40 cents

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- 1 per song might be reasonable in light of inflation.
- 2 We can imagine what the effect of that would be on
- 3 digital music sales.
- 4 Second, or third, the benchmarks that they
- 5 offer are flawed. And Mr. Smith did a good job and
- 6 I will not retread that ground, explaining what the
- 7 flaws are.
- 8 And, finally, even though Mr. Cohen did an
- 9 admirable job of trying to argue the contrary, the
- 10 copyright owners are relying on the discredited
- 11 bargaining room theory. They really are arguing
- 12 there is no harm in aiming high because bargaining
- 13 will occur. The theory is that you can set a rate
- 14 as high as they want and the parties will work
- 15 things out in the marketplace. It's the thread that
- 16 holds the whole proposal together.
- Now, Dr. Landes agrees the economic logic
- of his proposal is undermined already by the legal
- 19 prohibition on negotiating rates below statutory for
- 20 digital phono record deliveries. Even he has
- 21 written extensively about how transaction costs tend
- 22 to be high for intellectual property. And you'll

Page 187 1 will hear more about that in the testimony. 2 The theory of bargaining has been rejected 3 as a legal matter and, moreover, as a factual matter repeatedly and it should not have any presence in 4 5 this proceeding. I should also mention the copyright owners 6 7 will argue about unbundling the album. They will say, you heard Mr. Cohen remark, unbundling the 8 9 album and selling singles is a reason, another 10 reason, another of the many reasons for a higher 11 This argument is completely illogical. rate. 12 Unbundling an album, if you want to call it that, 13 increases the distribution of musical works. 14 makes them all available to paying customers. 15 just to the customer who wants to spend \$12 on an 16 album but the customer who wants to buy any song. 17 Every song is available. 18 It's true a song that no one wants to buy 19 may not sell theoretically, but that song was never 20 going to sell an album and it's available now to 21 somebody who wants to buy it. And I at least have 22 explored these services and found a lot of songs I'm

Page 188 sure nobody wants to buy. They are all available. 1 They are available for listening on subscription 2 services. 3 So that argument has no logic. I want to 5 spend a brief moment on the arguments you'll hear 6 from the copyright owners about DiMA's case. 7 copyright owners will argue that the Court should not set royalty rates as a percentage of revenue. 8 9 They are wrong about that. First, you will hear 10 testimony even they agree a percentage structure is necessary where business models are involving. Even 11 12 they propose revenue definitions to make that 13 revenue structure, that royalty rate structure work. 14 And as we will hear in the testimony, a 15 percentage of revenue is required under existing That's why you see percentage 16 economic conditions. 17 of revenue structures around the world. That's why 18 you see percentage of revenue structures with public 19 performance licenses for musical works. 20 tell the Court that a percentage of revenue 21 structure won't working they are asking you to close 22 your eyes to all of that.

|    | Page 189   |
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| 1  | Second, the copyright owners are going to            |
| 2  | argue vehemently, we already heard it this mornings; |
| 3  | look out, DiMA is going to argue for lower rates.    |
| 4  | They want a rate cut. Let me just say there is no    |
| 5  | question about the obligation for the rate set in    |
| 6  | this proceeding to meet the statutory objectives.    |
| 7  | Everyone agrees there has been a sea                 |
| 8  | change in economic conditions. Everyone agrees they  |
| 9  | are fundamentally different and we are not going     |
| 10 | back. And guess what. Every aspect of the sea        |
| 11 | change can be great for the copyright owners. It     |
| 12 | can benefit them. But it's not going to benefit      |
| 13 | them by making it more expensive.                    |
| 14 | The answer is to grow the pie, to put more           |
| 15 | water into the copyright royalty pool. It's not      |
| 16 | about dividing it up. How are we going to increase   |
| 17 | copyright owner surplus, consumer surplus under the  |
| 18 | existing economic conditions? Not the way they       |
| 19 | argue.   |
| 20 | Now, finally, you heard a little about it            |
| 21 | already. It's an obsession on their part. They are   |
| 22 | going to argue, look out, some users can pay and     |

Page 190 should pay more. That's totally illogical. They 1 agree this is a competitive market. They even claim 2 3 there are no entry or expansion barriers. They will 4 agree that piracy is driving down or putting 5 downward pressure on sales and on prices. Their 6 expert will even agree that the demand for popular 7 music is highly elastic. In light of this, there is no indication 8 9 that prices are not competitive. How can they 10 reconcile this with a proposal to raise our marginal costs? They will say it's because some companies 11 12 can pay more. Well, rates aren't being set here for 13 some companies. Rates aren't being set here for 14 some copyright owners. We are not setting a rate 15 for the most popular songwriter. This Court needs 16 to set rates that recognize the need for additional 17 investment in the industry, because that's what economic conditions require. That's how copyright 18 19 owners will benefit. That's how the availability of creative works to the public will be maximized. 20 21 The copyright owners can't show there is a 22 shortage of songwriters or a shortage of songs.

Page 191 When they argue about a shortage of songs they are 1 2 arguing about popular taste, not about the songs. 3 There is no shortage of songs. Consumer appetite for paid digital music is elastic. 4 Increasing 5 costs, raising prices is not the way to increase 6 It's not the way to build this business. revenues. 7 And that's the reality. 8 There is a lot of disagreement about how 9 to split things up, but there cannot be a 10 disagreement about that. Even a small increase in 11 investment and innovation will have a bigger 12 positive impact on shared revenues for copyright 13 owners and users than an increase in the incentive 14 to write more songs. 15 DiMA's case best achieves the statutory 16 objectives, maximizing the availability of creative 17 works, by getting them to paying customers, 18 reflecting fair income and fair return, by 19 recognizing this market requires integration and sharing of risk and reward. Those are the economic 20 21 conditions that we are under. By reflecting the

creative contributions that are made in making the

22

|    | Page 192   |
|----|--|
| 1  | product available, by minimizing disruption but not  |
| 2  | stifling the market.                                 |
| 3  | The copyright owner's proposal is counter            |
| 4  | productive because it's the days of more for you,    |
| 5  | less for them. Those days have to end. This is       |
| 6  | about growing the pie, making more available to all  |
| 7  | the market participants. In the words of Mr.         |
| 8  | Faxson, the less you sell, the less our guys make.   |
| 9  | It's as simple as that. And I would submit that      |
| 10 | that is exactly what DiMA's case addresses.          |
| 11 | Thank you for your time.                             |
| 12 | JUDGE SLEDGE: Thank you. Well, in                    |
| 13 | hearing the opening statements, it's apparent that   |
| 14 | when these parties present their matters to Congress |
| 15 | they take celebrity artists and present concerts. I  |
| 16 | don't hear us getting any celebrity artists or       |
| 17 | concerts. I see where your priorities lie.           |
| 18 | We will recess 10 minutes.                           |
| 19 |  |
| 20 | (Recessed at 2:28 p.m.)                              |
| 21 | (Reconvened at 2:42 p.m.)                            |
| 22 |  |

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 1
               JUDGE SLEDGE: Thank you. We will come to
 2
     order.
 3
               JUDGE ROBERTS: Mr. Cohen, you want to
 4
    make sure at the end of the day to collect these up.
 5
               MR. COHEN: Why don't I do that now.
               JUDGE SLEDGE: I think, Mr. Carnes is your
 6
 7
     first witness?
 8
               MR. SMITH: Yes, Your Honor. I gather in
 9
     other trials, is there some rule, you want to keep
10
     this table clear?
               JUDGE SLEDGE: Yeah. If you wouldn't mind
11
12
     doing that. We had one instance of a question of
13
     suggestions to a witness, the attorney being that
14
     close.
15
               MR. SMITH: Is it all right for Mr. Carnes
16
     to be seated?
17
    Whereupon,
18
                      RICK CARNES,
19
     called for examination by counsel, and having been
20
     duly sworn, was examined and testified as follows:
21
               JUDGE SLEDGE: Thank you. Please be
22
     seated.
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|    | Page 194   |
|----|--|
| 1  | MR. SMITH: May I proceed, Your Honor?                |
| 2  | JUDGE SLEDGE: Yes.                                   |
| 3  | EXAMINATION CONDUCTED                                |
| 4  | BY MR. SMITH:  |
| 5  | Q Would you please state your name for the           |
| 6  | record, please?                                      |
| 7  | A My name is Rick Carnes.                            |
| 8  | Q And what is your occupation?                       |
| 9  | A I'm a professional songwriter.                     |
| 10 | Q How long have you been a songwriter?               |
| 11 | A Since 1970. I guess it will be 30 years.           |
| 12 | Q Now, in addition to your song writing              |
| 13 | work, are you involved in any organizations relating |
| 14 | to the work of songwriters?                          |
| 15 | A Yes. I'm President of the Songwriters              |
| 16 | Guild of America.                                    |
| 17 | Q Mr. Carnes, have you submitted a sworn             |
| 18 | written statement?                                   |
| 19 | A Yes, I have.                                       |
| 20 | MR. SMITH: Your Honor, may I approach the            |
| 21 | witness? Just because this is my maiden voyage,      |
| 22 | should I drop one off with each of the judges along  |

|    | Page 195   |
|----|--|
| 1  | the way.   |
| 2  | JUDGE SLEDGE: Yeah.                                  |
| 3  | (Copywrite Owners Exhibit Number 1                   |
| 4  | was marked for identification.)                      |
| 5  | BY MR. SMITH:  |
| 6  | Q Let me show you what we've marked as               |
| 7  | Copyright Owners Trial Exhibit 1 for identification. |
| 8  | Mr. Carnes, do you recognize Exhibit 1 for           |
| 9  | identification?                                      |
| 10 | A Yes, I do.   |
| 11 | Q If you would turn to the last page, is             |
| 12 | that your signature?                                 |
| 13 | A Yes, it is.  |
| 14 | Q And is there anything that's untrue in             |
| 15 | this written statement to the best of your           |
| 16 | knowledge?   |
| 17 | A Not that I know.                                   |
| 18 | MR. SMITH: I offer Exhibit 1.                        |
| 19 | JUDGE SLEDGE: Mr. Carnes, that last                  |
| 20 | question added a clause that's impermissible. Is     |
| 21 | everything in this document true?                    |
| 22 | THE WITNESS: Yes.                                    |

|    | Page 196  |
|----|---|
| 1  | JUDGE SLEDGE: The omission of or                    |
| 2  | restriction of to the best of your knowledge is not |
| 3  | a permissible limitation on this document.          |
| 4  | Are there any objections to Exhibit 1?              |
| 5  | MR. LAGUARDA: No, Your Honor.                       |
| 6  | MR. CONNOLLY: No on behalf of DiMA, Your            |
| 7  | Honor.  |
| 8  | JUDGE SLEDGE: Admitted.                             |
| 9  | BY MR. SMITH:                                       |
| 10 | Q Can you tell the Court a little bit about         |
| 11 | the Songwriters Guild of America?                   |
| 12 | A The Songwriters Guild of America is the           |
| 13 | nation's oldest and largest songwriters             |
| 14 | organization. We have offices in New York, Los      |
| 15 | Angeles and Nashville. We have been around since    |
| 16 | 1931 and born on Broadway. We expanded out to       |
| 17 | Hollywood and now we have moved into national.      |
| 18 | We are probably best known for                      |
| 19 | establishing the benchmark contract for songwriters |
| 20 | in 1931. It's still used in most textbooks. It's    |
| 21 | the songwriters guild contract. And we also do      |
| 22 | professional services for songwriters. We advocate  |

Page 197 legislatively for songwriters. 1 2 If you can try keep your voice up. having trouble hearing you and I think others may as 3 Do the best you can. 5 Α Okay. How long have you been President of the 6 7 SGA? I have been the President since 2002. How many songwriters belong to the 9 0 10 Songwriters Guild of America? 11 It varies year to year, but generally between 3,500 and 5,000 is about where it varies. 12 13 Can you tell us a little more about the 14 services that the SGA provides for its members? 15 Α I also neglected to say we are 16 wholly by and for songwriters. Our entire board is 17 exclusively songwriters so we don't represent anyone but songwriters. Our services are basically we have 18 19 catalog administration, we collect and distribute 20 royalties, check statements and audit music 21 publishers. We have, like I said, done legislative 22 advocacy.

Page 198 Can you describe that legislative advocacy 1 0 2 that the SGA is engaged in? Over the last couple of years we were 3 A involved in the attempt to reform the 115, Section 5 115. And we have also done anti-piracy work. And 6 during the Napster case we were involved in trying 7 to help the music, United Collision in that effort. I was actually given an award by the RIAA for my 8 fight against piracy. 9 10 Sir, if we can turn to your own career as a songwriter, could you explain to the Court how you 11 got involved in this business? 12 13 I went to the University of Memphis, which 14 was Memphis State at the time. I graduated in 1973 15 with a degree in political science and a masters 16 degree in elementary education and came out of 17 school in the middle of the biggest recession in 20, 18 30 years. And so there were no jobs. And the only 19 thing I actually could earn a living at was to pick 20 up my guitar and start playing music again. 21 From there I met my wife during that 22 period of time and we formed a group and we had

Page 199 decided to take our chances in the music business 1 and wanted to move to Nashville but we didn't have 2 the money. It took us five years of playing on the 3 road to get up the money to move to Nashville and 4 5 establish ourselves. So then we moved to Nashville 6 and I got a publishing deal from what is now Sony 7 Music, and they advanced me money, put me in with a pool of 116 other professional songwriters. 8 9 learned to write by writing with those writers and dealing with the song pluggers and people that 10 produced the demos and stuff at Sony Music and from 11 there my career progressed. 12 13 What's a song plugger? 14 A song plugger is the guy that the music Α 15 publishing company hires to go out and pitch your 16 song. As a beginning songwriter I had no 17 connections to be able to get songs to any of the 18 big artists, so my music publisher had a group of guys at the time who actually had those connections 19 20 and could go get the artist to listen to the songs 21 and hopefully the songs were good enough that 22 somebody would record them. So they were literally

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- 1 pitching the songs.
- 2 Q Did there come a time in your career as a
- 3 songwriters that you were able to sustain yourself
- 4 based on that occupation?
- 5 A Yes.
- 6 Q When was that, sir?
- 7 A Actually, I really started earning back
- 8 some of the monies that were advanced to me around
- 9 1981. Previous to that I was just barely getting
- 10 by.
- 11 Q What happened in 1981?
- 12 A In 1981 I had a song recorded by Rebba
- 13 McIntyre that went number one. It was her first and
- 14 my first number one song, so that helped earn some
- 15 money for me.
- 16 Q What was that song?
- 17 A It was called I Can't Even Get The Blues.
- 18 Q What happened to your career after the
- 19 release of the Rebba McIntyre song?
- 20 A Well, of course, when your hot everybody
- 21 wants to record your stuff so I started getting a
- 22 lot. At one time I had three songs on the charts at

Page 201 I had three top ten records that I called the 1 2 Whites, which is mostly bluegrass kind of stuff. had a very good run there. And then my wife and I 3 got a record deal based on the activity that we had 5 going at the time. Then we recorded for about two, 6 more like three years, and then as fate would have 7 it, we went cold and we lost our record deal, lost 8 our publisher. How did you sustain yourself after you 9 10 went cold? We didn't completely lose all of our 11 12 contacts. I had a couple of songs recorded, one by 13 Rebba McIntyre and one by Ham Tilla. And those two 14 songs sold very well. I think they both were on 15 gold albums. And the mechanicals from those songs 16 carried me through the cold period I had until I got 17 another publisher. 18 When you say the mechanicals, you mean the Q mechanical royalties? 19 20 Because those songs weren't singles. Α 21 If a song is a single, it will get performance money. And there might have been that revenue 22

Page 202 1 In those two instances they were not stream. 2 singles. 3 You said they weren't singles. What did 4 you mean by that? 5 When a song is a single, that's when it's А released to radio and it becomes a well know air 6 7 play kind of song, you hear it on the radio. songs don't get to be singles, most are album cuts. 8 9 For every album there may be two to three singles. 10 Did there come a time when you achieved 11 some songwriting success again? 12 Α In 1994 I signed a publishing deal 13 with Pure Music. They are a large independent 14 publisher, and they sort of reestablished my 15 connections with the music industry national and I 16 got a song record bid Garth Brooks in 1995. 17 And it actually came out in 1997, but my 18 publisher, knowing that the Garth Brooks cut was in 19 the pipeline, kept me for those couple of years with 20 more advances. 21 What was the name of that song? Q 22 It was called Longneck Bottle.

|    | Page 203   |
|----|--|
| 1  | Q How many copies has that song sold?              |
| 2  | A According to the RIAA certification thing        |
| 3  | it's 38 platinum. So that should be 38 million.    |
| 4  | Q I think you gave a different number in           |
| 5  | your statement?                                    |
| 6  | A Yes, I did. That statement was from 2006.        |
| 7  | And I checked on it this weekend so it would be up |
| 8  | to date now. So the figure I'm giving you now is   |
| 9  | 2008.  |
| 10 | Q 38 million? Now, over the course of your         |
| 11 | career how many songs did you have that have been  |
| 12 | recorded?  |
| 13 | A Probably, you know, I couldn't give you an       |
| 14 | exact number because a lot of stuff gets recorded  |
| 15 | internationally and I don't find out about it. A   |
| 16 | lot of it is cuts I don't think about. But in      |
| 17 | excess of 50 I would say.                          |
| 18 | Q How many songs have you written since 1980       |
| 19 | or the late '70s?                                  |
| 20 | A I couldn't tell you actually. I write            |
| 21 | between 35 and 50 songs a year. So you can take    |
| 22 | that and multiply it by 30 and that will tell you. |

Page 204 Average maybe 40 every year. 1 2 Is it hundreds or thousands? Or it's at least in the thousands I would 3 А 4 say. 5 And can you describe for the Court the Q process that you engage in to write a song? 6 7 Well, it kind of depends on what kind song Α 8 I'm writing. If I'm writing a country song, I have 9 a book of titles that I have kept for about 25 10 I'll thumb through the titles and if anything looks like it's worth writing that day I'll 11 12 stare at the blank page until hopefully some sort 13 inspiration hits. And a couple of days we'll get a 14 song written. It may require further writing, 15 rewriting, rewriting. I write a lot of jass stuff 16 And with that it's a whole different process 17 because I have to sit down and actually write out 18 the manuscript. You would have to write out melodic 19 motifs and work on the structure of the song and if 20 it's real complicated it's about three or four weeks 21 on every one of those. 22 Of the 50 or so songs that you have Q

Page 205 written that have been recorded, how many have gone 1 2 platinum? If you could maybe explain what that 3 means? 4 Ά Okay. How many actual songs have actually 5 made it to platinum status? Correct. 6 0 Only two of my songs have actually made it 7 8 to platinum status. The Rebba McIntyre song, which 9 was a number one song, and the Garth Brooks song. 10 have had three other songs go gold but only two went platinum. 11 12 And I wonder if I could direct your 0 13 attention to paragraph 15 of your direct and what 14 you do in paragraph 15 to paragraph 16 is to explain 15 what the financial impact is or the financial result 16 is for a songwriter for a million dollar platinum 17 song? 18 Α Correct. 19 Could you summarize that for us? 20 Α First of all, I would like to say that you 21 so seldom go platinum, I think there is only one act 22 that's even got triple platinum this year at all in

Page 206 1 the entire music business. It's a very rare 2 occasion when you go platinum. 3 But when a song goes platinum now from my perspective, we are talking about rates and how much 4 5 everybody makes, this is how much I make as a 6 songwriter. When it goes platinum based on the 9.1 7 cent sale, it's \$91,000 all in for everything. 8 I split that money with my publisher half and half. 9 So I get \$45,500, right? And then I split that with 10 my co-writer who is usually an artist, because to 11 get the songs recorded nowadays you pretty much 12 always have to write them with an artist. 13 So then I split it again and my share now 14 becomes \$22,750. But the problem is it doesn't stop 15 Because if you write the song with an there. 16 artist, ordinarily the artist has a controlled 17 compositions clause which requires you to give them 18 a 75 percent rate to get the song on the album. 19 in actual point of fact at the end of the day on one 20 million sales I only make \$17,062 and 50 cents. 21 federal poverty quidelines for a family of four is

So for a million selling song I'm \$3,000

22

Page 207 1 under the poverty level. 2 You mentioned controlled composition 0 Can you explain to the Court what those 3 are, please? 4 I was actually, like I said, a recording 5 artist on three labels myself. And when you sign as 6 a new artist, they tell you that any song that you 7 write, if you are going to get this record deal, any 8 song that you write you are going to get paid 75 9 cent -- 75 percent of the statutory rate, 10 11 three-quarters of what you should actually receive 12 according to the statutory rate and it's a take it 13 or leave it. Either you take that and you sign or you don't get the record. That was the deal I got 14 15 three times. 16 So I really had no choice. I signed the 17 deal. And on those songs that we put out we got three-quarters rates. 18 Have you ever received less than three 19 20 quarter rates on some songs? 21 Α Oh, yeah. 22 If you would turn to paragraph 17, you

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- 1 discuss what happened with respect to Longneck
- 2 Bottle. Can you explain that to the Court, please?
- 3 A On the limited series that came out, and
- 4 also just recently on the ultimate hits album, so
- 5 there are two albums that this happened on. Instead
- of getting the 9.1 -- 9.1 cent rate, I got a half
- 7 rate on that. And it was once again a sort of take
- 8 it or leave it. If you don't give us this rate,
- 9 then we will use somebody else's song on the album.
- 10 So I felt like half of 9.1 was better than nothing.
- 11 So I had to take the rate. And so I was making --
- 12 at the end of the day my effective rate was 1.125
- 13 cents. That's what I actually got.
- 14 Q Can you take us through the steps?
- 15 A Okay. I'll try to do the math, but it's
- 16 \$45,000 split in half. So that's 22,750. 22,000.
- 17 And then half of that is 11,000. So I was making
- 18 \$11,000 per million.
- 19 Q Now, sir, I would like you to turn -- let
- 20 me ask you this before I do that. Do you have any
- 21 knowledge as to whether you earned -- do you have
- 22 any knowledge as to whether your experience with

Page 209 respect to controlled composition is typical of 1 2 other artists? 3 Oh, yeah. Well, for instance, I have had I think four cuts on new artists over the last 5 couple of years and every one of them had controlled composition clauses in their contracts. didn't come out because in each one of the cases the 7 artists lost their record deals, but yes, they had 9 controlled comps in their record deals. Do other members of the SGA write songs 10 11 that are subject to controlled comp clauses as well? 12 Α It's an industry standard with new 13 When you get to a Garth Brooks level artists. usually you can say no and you don't have to do it. 14 15 But how many people get to that level. JUDGE ROBERTS: Mr. Carnes, just a 16 17 question he so I'm fully clear here. On the song Longneck Bottle, did you write that with Garth 18 19 Brooks or you wrote it solely by your own? 20 THE WITNESS: No, Your Honor. I co-wrote 21 that song with a guy named Steve Warner. Somebody named Steve 22 JUDGE ROBERTS:

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- 1 Warner. How did you come to be subject to a
- 2 controlled composition clause.
- 3 THE WITNESS: Okay. In Longneck Bottle
- 4 what happened was the first cut they put it out at
- 5 the full rate which was like 7.1 or something at the
- 6 time. The second time they released it they asked
- 7 for a three quarter rate. It wasn't a controlled
- 8 comp, it was just if you want to record it again,
- 9 it's a three quarter rate. And after that they
- 10 asked for a half rate. So as it gets released again
- 11 they are stepping down the rate.
- JUDGE ROBERTS: I'm trying to understand
- 13 the relationship you had with the record company
- 14 that they were coming to you and telling you this is
- 15 what we are going to pay.
- 16 THE WITNESS: Your Honor, what happened
- 17 was that the record company called up all the
- 18 writers that they wanted to get the songs from on
- 19 the limited edition box set, and they said if you
- 20 want your song on here it has to go in on the three
- 21 quarter rate.
- JUDGE ROBERTS: I understand now that you

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| 1  | said it's better to take it than to be passed over?  |
| 2  | THE WITNESS: 75 percent of something.                |
| 3  | JUDGE ROBERTS: And have some other Garth             |
| 4  | Brooks song. Thank you.                              |
| 5  | BY MR. SMITH:  |
| 6  | Q Let me ask another question to clarify             |
| 7  | something. You mentioned with respect to new         |
| 8  | artists those artists are often subject to           |
| 9  | controlled composition clauses with their record     |
| 10 | labels?  |
| 11 | A Yes.   |
| 12 | Q How as a writer does that contract between         |
| 13 | the record label and the recording artist require    |
| 14 | you to take a controlled comp rate?                  |
| 15 | A That's interesting, because what happens           |
| 16 | is if I don't take that rate, okay, then the artist  |
| 17 | has to make up that part out of their side of the    |
| 18 | earnings. In other words, if I don't grant a three   |
| 19 | quarter rate and the song goes on the album, the     |
| 20 | record label makes the artist pay the quarter out of |
| 21 | their side so the artist gets a 50 percent rate.     |
| 22 | The artist isn't going to do that. He will say I'll  |

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| 1  | take somebody else's song that I co-wrote and put    |
| 2  | that on the album. Whoever is going to go along      |
| 3  | with me and grant the three-quarter rate is going to |
| 4  | get the song on the album. That's economic reality.  |
| 5  | Q Would you turn, please, to paragraph 19            |
| 6  | which sets out the copyright owners proposal for     |
| 7  | mechanical royalties in this proceeding, paragraph   |
| 8  | 19 of your witness statement?                        |
| 9  | A Yes.   |
| 10 | Q And do you understand first all, let me            |
| 11 | ask you has the Songwriters Guild of America         |
| 12 | endorsed this proposal?                              |
| 13 | A Yes, we have.                                      |
| 14 | Q Do you understand that it's seeking                |
| 15 | increases in the mechanical rates?                   |
| 16 | A Definitely.  |
| 17 | Q Could you explain to the Court why you and         |
| 18 | the SGA believe that increases are warranted?        |
| 19 | A All right. First of all, I base the                |
| 20 | fairness of this proposal on the idea of what my     |
| 21 | contribution as a songwriter and all songwriters     |
| 22 | contribution is to the process. I mean at the end    |

Page 213 1 of the day it starts and ends with the song. We are 2 the first ones to work, the last ones to be paid. 3 If you don't have the song, you are not 4 going to anywhere. You know, you have got to have a 5 hit in the market. And the most -- I mean I know 6 they say there will always be songs, yes, and there 7 always will be rocks, but if you want diamonds, you 8 have to pay the miners. And in order to get a 9 diamond of a song, you have to pay somebody who has 10 really taken the time to learn how to write songs. 11 So this proposal takes into consideration 12 the fact that I feel that our contribution to the process is significant. And a 12.5 cent rate for a 13 14 mechanical I feel is fair, because first of all, we 15 are not making it at 9.1. The money just isn't in 16 the system. As I pointed out, it's \$17,000 at the 17 end of th eday if you go platinum. When everybody 18 was going multiple platinum back in Nashville in 19 '92, that might have been okay. But nobody is going 20 multiple platinum now. It doesn't happen that 21 often. 22 And in that case we are looking for a rate

Page 214 that will at least allow us to be able to pay the 1 2 mortgage, put the kids in school and have a car, 3 health insurance, and at 17,000, we are under the poverty line. But on this proposal, even taking all of those cuts into consideration, we would be at 5 23,000. 6 7 On the rate for limited downloads, it's 15 percent of revenue or one-third the musical content 8 9 costs, the greater of or the .0033 cents. Looking at that I just consider it one-third of the content 10 as my contribution. I think that's fair as a 11 12 songwriter. 13 Why do you say that? 14 Well, because I'm the guy that sat in the 15 room and came up with the song. You know, I know 16 the record labels and the DiMA companies feel they 17 have a significant risk that they put in and that 18 ought to be factored in. But nobody takes more risk 19 than a songwriter. Nobody. Because our 20 profession -- what are my chances of getting a song 21 Every out to the market? They are extremely small. 22 day the record labels can put out a record. I don't

Page 215 get that chance. They have a chance to actually set 1 2 their price. I have no chance to set my price. My 3 price is set right here. Okay? I mean from 1909 to 1976 I didn't get a 4 5 raise. My price was at 2 cents while the record label's price went up and up and up. I stayed at 2 6 cents. They had the game. I didn't get to share in 7 the game. And now that they are having some pain, 8 I'm supposed to share in the pain. I consider that 9 10 my contribution to the process is at least a third. MR. SMITH: No further questions of the 11 12 witness. May I sit here or would you like me to 13 move back. 14 JUDGE SLEDGE: Go ahead and move back. 15 MR. FREEDMAN: Jerry Freedman for RIAA. 16 BY MR. FREEDMAN: 17 Good afternoon, Mr. Carnes. I'm Jerry 18 Freedman. I'll be asking you some questions on 19 behalf of RIAA. If you could turn to paragraph 15 20 that you were discussing a moment ago? You say 21 there that in theory a song that sells a million copies should net you \$91,000; is that right? 22

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| 1  | A Yes.   |
| 2  | Q And then you explain that after splitting          |
| 3  | the money with the publisher and the co-writers that |
| 4  | amount could be reduced to \$22,750; is that right?  |
| 5  | A Before controlled comps, yes.                      |
| 6  | Q The amount that the record company pays is         |
| 7  | \$91,000; right?                                     |
| 8  | A Not if there is a controlled comp clause.          |
| 9  | Q If there is not a controlled comp clause           |
| 10 | it's \$91,000?                                       |
| 11 | A Yes.   |
| 12 | Q And when you testify in our example in             |
| 13 | that paragraph about the reduction to 22             |
| 14 | A Let me restate. If the record label is             |
| 15 | giving a half rate, it's not 91,000, it's 45,000.    |
| 16 | It depends on where they set the original rate. So   |
| 17 | if they discount the original rate, it starts there. |
| 18 | Q In the example in paragraph 15, you are            |
| 19 | starting with a premise of \$91,000?                 |
| 20 | A Yes.   |
| 21 | Q So my questions on this follows from that?         |
| 22 | A Okay.  |

Page 217 It's true, isn't it, that without a 1 0 2 co-writer in that example, a songwriter would earn double that, \$45,000; right? 3 4 Yes. And if that songwriter in your example 5 0 6 didn't have a co-writer and self-published, that 7 songwriter would pocket the whole 91,000; right? 8 Α Yes. And the decision to write with a 9 co-writer, that's a choice that's made in the 10 11 marketplace; right? 12 Α It's a choice more or less imposed on me 13 by the marketplace. For instance, Elvis Presley is 14 listed as co-writer on practically every song that 15 he ever recorded. But to my knowledge he never 16 actually sat in the room and wrote any songs. 17 what happens is you have the record labels insisting 18 that the artist be writer/artists, but in actual point of fact most of the time they will bring in a 19 20 professional songwriter to help write the song. 21 So it's your testimony today that that's 0 22 imposed on you by the marketplace?

Page 218 That's the marketplace reality. 1 Α 2 Q Is it true that most songwriters have a 3 75/25 split with the publishers? Is that accurate? 4 I have only had one deal like that back 5 when I was a recording artist. As a professional 6 songwriter, no, I haven't had those deals. 7 Now, it's also true that songwriters are 8 sometimes paid advances? 9 А Yes. 10 But that's not reflected in your 11 paragraph? 12 Well, I don't think it's in there. 13 advances are against mechanicals. That's not a 14 separate stream of income. The \$91,000 that you 15 make theoretically, if you've taken a draw from your 16 publisher of \$45,000 a year, you would have to pay 17 back those advances before you got any money. 18 And in the example you use in paragraph 15 Q where you end up with 22,750, if you had received an 19 20 advance let's say of \$30,000, you went back to 21 \$30,000, you wouldn't have to pay back any portion 22 of that advance?

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| 1  | A If they have advanced me \$30,000 and I              |
| 2  | recouped \$22,000, they will take the entire \$22,000. |
| 3  | Q And you'll keep the difference; right?               |
| 4  | A No. Well, yeah, if I make 30,000, yes.               |
| 5  | Q And sometimes a songwriter gets paid in              |
| 6  | advance even though a song never gets recorded;        |
| 7  | right?   |
| 8  | A Yes, but you don't keep your deal very               |
| 9  | long, because if you don't recoup your advances they   |
| 10 | let you go.  |
| 11 | Q Let me turn your attention to paragraph 17           |
| 12 | if I could. And you state there that Longneck          |
| 13 | Bottle, which was a popular song you wrote was         |
| 14 | recently re-released?                                  |
| 15 | A Yes.   |
| 16 | Q And you agreed to a mechanical rate of 4             |
| 17 | and a half cents per song?                             |
| 18 | A Yes. One-half rate.                                  |
| 19 | Q You didn't have to enter that deal; right?           |
| 20 | A No.  |
| 21 | Q You I think testified this afternoon that            |
| 22 | was a take it or leave it deal from the record         |

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| 1  | company?   |
| 2  | A Yes.   |
| 3  | Q And you could have left it?                        |
| 4  | A Well, it just depends on whether I want to         |
| 5  | make any money at all or not. Actually, I can't      |
| 6  | afford not to because I have to make a living.       |
| 7  | Q You are free to reject that offer and take         |
| 8  | your song and shop the marketplace, aren't you?      |
| 9  | A Yes.   |
| 10 | Q And that's a popular song, isn't it?               |
| 11 | A Yes.   |
| 12 | Q Did you in fact when you got that offer of         |
| 13 | 4 and a half cents, did you try to shop around with  |
| 14 | other record companies to try to see if you could do |
| 15 | better?  |
| 16 | A No. It's basically identified with Garth,          |
| 17 | so I'm sorry. It's basically identified with         |
| 18 | Garth Brooks at this point, so for me to take it and |
| 19 | try to pitch it to another artist, it's already been |
| 20 | branded with him so it's going to be practically     |
| 21 | impossible for me to get some one else to record it. |
| 22 | Q Is it your testimony that's the best you           |

Page 221 could do in the marketplace with that song? 1 2 Am I ever going to get another cut that's Α going to make me that many millions in sales? 3 4 Probably not on that song, no. 5 Let me turn your attention if I could to Q 6 paragraph 16. Do you see there you testified that record companies typically require artists to agree 7 to controlled composition clauses at 75 percent of 8 statutory rate? 9 10 Uh-huh. 11 0 The controlled composition clause is a 12 contractual agreement between an artist and a record 13 company? 14 Right. А Again if the artist doesn't want a 15 16 controlled composition clause, he doesn't have to 17 sign the contract? 18 He doesn't have to record. 19 He doesn't have to sign the contract; 20 right? 21 But if he wants a record deal -- I Α No. 22 mean that -- in my experience, I really didn't have

Page 222 1 a choice. Every record label had controlled 2 composition clauses and when we shopped around to 3 other labels, they all had the same thing. So the going rate in the marketplace was 4 5 75 percent statutory rate? 6 Α If you were a new artist, yeah, and couldn't get a better rate. 7 8 I'm sorry. You say in paragraph 16 I Q 9 think that record companies typically require artists to sign at 75 percent of the rate? 10 11 Α Yes. 12 You are talking about all artists there, 13 aren't you? 14 A They try to impose it on practically 15 everyone. 16 Again, if an artist feels like he can get 17 a better rate somewhere else, he can go to another 18 record company, right? 19 Yes. 20 One other think about controlled 0 21 composition clauses. It's true, isn't it, that by 22 law controlled composition causes entered into after

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|   | 1   | 1995 don't apply to digital phono record deliveries? |
|   | 2   | MR. SMITH: Objection. Asks for a legal               |
|   | 3   | conclusion.  |
|   | 4   | JUDGE SLEDGE: As the question is phrased,            |
|   | 5   | sustained.   |
|   | 6   | BY MR. FREEDMAN:                                     |
|   | 7   | Q Let me turn your attention to paragraph            |
|   | 8   | 19, please. And in that paragraph you discuss the    |
|   | 9   | rate proposal that SGA has submitted or endorsed in  |
| 1 | 0   | this case; is that right?                            |
| 1 | 1   | A Yes.   |
| 1 | 2   | Q And you described the proposal for                 |
| 1 | 3   | ringtones; is that correct?                          |
| 1 | 4   | A Yeah. It's in the testimony, yes.                  |
| 1 | 5   | Q In your written testimony you discussed            |
| 1 | 6   | the proposal for ringtones?                          |
| 1 | 7   | A Yes.   |
| 1 | 8   | Q Have any of the songs you have written             |
| 1 | 9   | been turned into ringtones?                          |
| 2 | 0 - | A To my knowledge, yes. Longneck Bottle.             |
| 2 | 1   | Q Any others?  |
| 2 | 2   | A Not that I know of.                                |

Page 224 1 Is it fair to say that that's the most 2 popular song you've written? 3 А Yes. 4 Is it your experience that it's popular 5 songs that can turn into ringtones? I mean unless it's an all-in deal 6 Д 7 where they take the entire catalog. I'm sorry. I'm asking about songs getting 8 0 9 turned into ringtones, not being licensed for use 10 as? 11 Α Yes. 12 So the answer to my question of whether 13 it's popular songs that are turned into ringtones, that's yes? 14 15 Yes. Α Paragraph 21, if I could direct your 16 17 attention there. You say in that paragraph that --18 JUDGE ROBERTS: What do you mean by turned 19 Are you talking about a master tone here? 20 Are you talking about simply the older style --21 MR. FREEDMAN: My question actually wasn't 22 drawing a distinction. I meant to distinguish

Page 225 between something being licensed as ringtone but 1 2 never put on the market as a ringtone. Would you 3 like me to inquire of the witness? The question was yours. 4 JUDGE ROBERTS: Τ 5 just wanted to understand what it was you were 6 asking. 7 BY MR. FREEDMAN: 8 In paragraph 21, if I could direct your 0 9 attention there. You say there that mechanical 10 royalties don't provide enough money for songwriters 11 to support their families. Do you see that? 12 Α Yes. 13 Is it your testimony that the mechanical 14 rate should be set so that songwriters are able to 15 support their families from the money earned from 16 mechanical royalties? 17 А Well, one of the things that I would hope that the copyright law provides for with this rate 18 19 is that we create career opportunities for 20 songwriters. And in order to have a family, you 21 must have a career. And if the rate is so low that 22 it doesn't support a career, then you'll have to go

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| 1  | into another business. And that hurts the quality   |
| 2  | of American music.                                  |
| 3  | Q Well, it's true, isn't it, when you write         |
| 4  | a song the mechanical isn't the only revenue you    |
| 5  | receive for it; right?                              |
| 6  | A Yes.  |
| 7  | Q You get performance royalties for songs           |
| 8  | played on the air?                                  |
| 9  | A Only for singles.                                 |
| 10 | Q And royalties for life performances?              |
| 11 | A Yes. Again that's mostly on singles.              |
| 12 | Q Some writers get performance royalties            |
| 13 | when their songs are played on internet radio;      |
| 14 | correct?  |
| 15 | JUDGE SLEDGE: What's the relevant?                  |
| 16 | MR. FREEDMAN: It's relevant to the                  |
| 17 | testimony in paragraph 21. He says that songwriters |
| 18 | depend on mechanical royalties for their livelihood |
| 19 | and also testified that that's the way they support |
| 20 | their families. I'm trying to establish that's not  |
| 21 | really true.  |
| 22 | JUDGE SLEDGE: I'm having a hard time                |
| !  |   |

Page 227 seeing the relevance of any of this testimony, but 1 2 go ahead. If I may say, one of the reasons why --3 Α JUDGE SLEDGE: No. You better wait for a 5 question. 6 BY MR. FREEDMAN: 7 I think my last question, forgive me if you answered this in the exchanges, songwriters get 8 paid for performance royalties for songs played on 9 10 the internet; right? 11 Α Yes. 12 And performance royalties for satelite 13 radio plays; right? 14 Д Yes. And songwriters get sync rights when their 15 songs are used in a TV show or movie; right? 16 17 Α Yes. But once again those are only your 18 very most popular songs. The mechanicals are for 19 the album cuts. That's the bulk of what you get. 20 And that's what pays your draw from your -- I mean 21 the reason why I say to keep you alive like during that dry period I had, the thing that kept me alive 22

Page 228 1 was mechanicals. 2 And it's true, isn't it, that all of the Q different sources of income that we've been 3 discussing this last couple of minutes all depend on 4 a record company recording and releasing one of your 5 songs? 6 7 They can record and release my songs all day long and if radio doesn't play it then I 8 9 don't get air play for it. 10 But it's necessary for that, is it not, that it be recorded and released? 11 12 A Yeah. That they be recorded and released. 13 The last thing I want to ask you about is 14 also in paragraph 21. 15 JUDGE SLEDGE: I'm going to have to interrupt you again. If radio doesn't play it, then 16 17 I don't make any money. Are you referring to physical sales? 18 19 THE WITNESS: Well, Your Honor, there is a difference between, of course, when it's played on 20 radio I do get performance money and I might 21 22 actually get sync money if it becomes popular

Page 229 enough. Ordinarily, the songs don't get played on 1 2 the radio, they go on an album. So I only get 3 mechanicals on those, because it's only record sales. So there is a distinction between those 5 sources of revenue. Because I can -- the majority of my songs I don't get air play money on, I just 6 7 get mechanicals. JUDGE SLEDGE: This is referring only to 8 the part of the case dealing with the mechanical for 9 10 physical sales? 11 THE WITNESS: Okay. In that case, 12 mechanicals, I don't get that for air play. I don't 13 get -- if it's played on the radio, it doesn't 14 change that. 15 JUDGE SLEDGE: Maybe you can straighten 16 out how that applies to what we are doing. 17 MR. FREEDMAN: Yes, Your Honor. As I 18 think it appears in his testimony, I think it's 19 paragraph 21, he is testifying that a mechanical 20 rate needs to be increased because among other 21 reasons he and other songwriters depend on a 22 mechanical royality for their livelihood. The point

Page 230 I was trying to establish is that from these songs 1 2 they have other sources of revenue. It's not 3 necessarily true that they necessarily depend on these mechanicals for their livelihood. These songs 4 5 generate revenue for them in other ways. 6 JUDGE SLEDGE: But mechanical royalties of physical sales? Is that what he is talking about? 7 8 MR. FREEDMAN: We can look at it. 9 reading from his testimony in paragraph 21. It says 10 songwriters depend on mechanical royalties for their 11 livelihood. And I was merely trying to elicit 12 testimony he receives other kinds of royalties such 13 as performance royalties from the songs he writes, 14 too. 15 JUDGE SLEDGE: All right. JUDGE ROBERTS: Before we leave this 16 17 topic, just so I have clarity here, Mr. Carnes, when 18 you said you get performance royalties only on singles, you are saying that because you are 19 20 equating that the radio stations and the other 21 playing sources who would be performing your work 22 only play singles? Is that your position?

Page 231 THE WITNESS: Your Honor, that's been my 1 2 experience. 3 JUDGE ROBERTS: Okay. But if in fact there is some service out there that is, and we in 4 5 our last proceeding on satellite radio we found 6 there were channels that play, quote/unquote, deep cuts where they took songs off of albums that were 7 not released and they were performed, you would get 8 9 something for that. 10 THE WITNESS: Your Honor, I'm seriously 11 hoping those channels found my album cuts. I hope 12 they will in the future. Right now by and large 13 unless it's been a single and released to radio, I 14 don't make any performance monies on them. I mean nothing significant. 15 16 Right. JUDGE ROBERTS: Okay. 17 MR. FREEDMAN: May I proceed? 18 Q The last subject I wanted to ask you about 19 is in paragraph 21. It's your testimony, isn't it, 20 that if a mechanical rate is not increased, fewer 21 songs will be written; is that right? 22 Α Yes.

Page 232 You don't provide any data or any studies 1 2 that shows that would be true, do you, with your 3 testimony? That's based on the fact that I grew up in 5 a songwriting community that was a thriving 6 community and now there are fewer songwriters in 7 that community. And in order to create art it takes 8 a community. Because you learn from each other, you 9 compete with each other, and that spurs the market 10 and it grows the market. When you lose that 11 community, you don't have the incentive to write and 12 the songs don't get done. You haven't in your written testimony 13 14 tried to quantify that; is that right? 15 I don't think I have that. Α 16 And is it your testimony that if the 17 mechanical rate were increased, more people would write songs? 18 Because there would be 19 That's true. 20 more career opportunities. As long as there are 21 career opportunities, you are going to get more 22 songs written. As a professional songwriter that

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| 1  | can devote seven days a week to writing songs, I can |
| 2  | write 35 to 50 songs a year. As someone without a    |
| 3  | year in songwriting I can't. I have to do something  |
| 4  | else to make a living.                               |
| 5  | Q Would you agree that having more songs             |
| 6  | written by folks like you and others is not the same |
| 7  | as having more songs released to the public; right?  |
| 8  | A There is a difference between amateur              |
| 9  | songwriting and professional.                        |
| 10 | Q My question was if more songs are written,         |
| 11 | that doesn't necessarily mean that more songs will   |
| 12 | be released to the public; right?                    |
| 13 | A Better songs will be released to the               |
| 14 | public.  |
| 15 | MR. FREEDMAN: I have no further                      |
| 16 | questions, Your Honor.                               |
| 17 | MR. SMITH: Your Honor, I just have one               |
| 18 | question on redirect.                                |
| 19 | JUDGE SLEDGE: It's not your turn.                    |
| 20 | MR. SMITH: Pardon me.                                |
| 21 | BY MR. CONNOLLY:                                     |
| 22 | Q I don't want to be the proverbial player,          |

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     but I won't waste much of your time either.
                                                   I'm Tom
1
2
     Connolly. I represent DiMA members. I have got
 3
     some questions that weren't covered by RIAA.
 4
     would like to talk to you briefly about the
5
     controlled comps clause. That's an agreement
 6
     between an artist and a recording company, a record
7
     label?
          Α
               Yes.
               That does not involve DiMA members
 9
10
     whatsoever; correct? It's not an --
11
               Unless, unless DiMA company is actually a
12
     record label.
13
               I think we will stipulate that the DiMA
14
     members in this particular proceeding are not record
15
     labels.
16
               So in your -- in your written direct
17
     testimony you have asked for an additional increase
18
     for digital music; correct?
19
               Yes.
20
               15 percent. But the controlled
          0
21
     composition clause does not apply to digital music,
22
     does it?
```

|    | Page 235  |
|----|---|
| 1  | A Not that I know of.                               |
| 2  | Q Okay.   |
| 3  | A But once again I'm not a legal expert on          |
| 4  | that.   |
| 5  | Q I understand that. You understand that            |
| 6  | the rates that are going to be set in this          |
| 7  | proceeding are prospective, correct, going forward, |
| 8  | as opposed to retrospective?                        |
| 9  | A Yes.  |
| 10 | Q So the justification for an increase in           |
| 11 | rates because of controlled composition clauses are |
| 12 | inapplicable to digital music going forward;        |
| 13 | correct?  |
| 14 | A Are they inapplicable? I'm not certain.           |
| 15 | I don't know.                                       |
| 16 | Q I think we have established that                  |
| 17 | controlled composition clauses don't apply to       |
| 18 | digital music for the most part?                    |
| 19 | JUDGE SLEDGE: He didn't answer that                 |
| 20 | question. He said he didn't know.                   |
| 21 | THE WITNESS: Yeah.                                  |
| 22 | JUDGE SLEDGE: So we have not established            |

Page 236 1 that. 2 BY MR. CONNOLLY: 3 Let me try to establish that. Α There could be a pass-through license 5 situation or something where the controlled comp 6 applies. I don't know. 7 Are you under the impression that the vast 8 majority of digital music has any application to the 9 controlled composition clause whatsoever? 10 Once again I literally don't know 11 exactly -- like I'm saying, if it's a big 12 pass-through license from some major record label, . 13 I'm not privy to that information as to whether they 14 are paying controlled comp rates or whether they are 15 passing through, or whether they are paying the 16 whole thing and the record labels are taking it out. 17 I don't know. 18 0 Let me ask it another way then. 19 your testimony that the controlled composition 20 clause is a justification for additional higher 21 rates for digital music going forward? 22 Α My testimony is as I wrote it and

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|----|--|
| 1  | perceived it is that 15 cents reflects more than     |
| 2  | just the controlled comp rate. It reflects the fact  |
| 3  | that the music is more valuable because its          |
| 4  | portable, that the music, it costs the record labels |
| 5  | less to produce. There is a whole plethora of        |
| 6  | reasons. That's not the sole reason, no.             |
| 7  | Q Was it part of your justification because          |
| 8  | you believed the controlled composition clause had   |
| 9  | some applicability to digital music. That was my     |
| 10 | question.  |
| 11 | A I guess. You know, I                               |
| 12 | Q Let me move  |
| 13 | A It is part of the entire testimony. Does           |
| 14 | it relate directly to the digital? I don't know.     |
| 15 | Q Fair enough. Would you agree, Mr. Carnes,          |
| 16 | that piracy, specifically illegal downloading, has   |
| 17 | had a major negative impact on the music industry in |
| 18 | the last decade?                                     |
| 19 | A Yes.   |
| 20 | Q When someone downloads a pirated track, no         |
| 21 | one gets any compensation for that; correct?         |
| 22 | A No. That's not correct.                            |

Page 238 Who gets compensated for that? 1 Q 2 Α Whoever the service is that provides the 3 illegal downloading site. They are selling advertising on top of my music and I'm not being 4 5 paid a dime. That's a fair point. Whoever is being 6 7 compensated for that is involved in a dirty 8 business; correct? 9 From my perspective. Α 10 When somebody illegally downloads or Q pirates one of your song, you are not compensated? 11 12 A Right. 13 Your publisher is not compensated? Q 14 Α No. 15 Q The record label is not? The artist, songwriters, nobody. 16 Α No. 17 all lose. 18 0 And digital music providers such as iTunes or Rapsody, who looses sales to piracy, they are not 19 20 compensated for that song when they lose it to 21 piracy, are they? 22 Α No.

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|----|--|
| 1  | Q In a nutshell                                      |
| 2  | A Assuming that they lost the sale.                  |
| 3  | Q In a nutshell, is it fair to say that              |
| 4  | piracy has essentially hurt everybody in the         |
| 5  | legitimate music industry?                           |
| 6  | A That's a really broad generalization.              |
| 7  | It's true in total, but if you get down to specific  |
| 8  | instances, if Apple is selling X number of files and |
| 9  | making money but my songs are getting stolen,        |
| 10 | they're making money and I'm not.                    |
| 11 | Q Are any of your songs on iTunes?                   |
| 12 | A Yes.   |
| 13 | Q Any of your compositions?                          |
| 14 | A Yes.   |
| 15 | Q The recent high level of piracy that we            |
| 16 | have spoken about, that's occurring at the current   |
| 17 | rate where the mechanical rate is set at 9.1 cents;  |
| 18 | correct?   |
| 19 | A Yes.   |
| 20 | Q And would you agree that in the world of           |
| 21 | the internet the alternative to the downloading or   |
| 22 | streaming services, the digital world in the         |

Page 240 1 internet, the alternative is free, it's pirated 2 music? 3 А You know, I have had this discussion a lot and I don't agree that's the alternative. I think 4 5 the alternative is to enforce the law. And we 6 shouldn't be punished because they aren't enforcing 7 The law should be applied to the internet 8 and it's not being applied. 9 What I'm trying to suggest or ask you 0 10 right now in terms of the legitimate download 11 services that are out there, the alternative to them 12 is free, pirated music; correct? 13 That's a sweeping generalization. 14 So will you not agree with that? Q 15 Α Not specifically, no. 16 Is it fair to say that from a 17 songwriters's perspective, the more legitimate music 18 providers, digital music providers, the more there are out there that pay licenses for those songs, the 19 20 better for the songwriters? 21 Depending on the rate. Α 100 services 22 paying me practically nothing will do me less good

Page 241 1 than two services paying me 15 cents. 2 Q Would you agree that in light of what we 3 heard in opening statement today and otherwise, that 4 the overall pie, the overall revenues in the music industry center have shrunk in the last five to 5 seven years for legitimate providers of the 6 7 industry? That's what I read, yes. I've read it. And one of the most significant factors in 10 that is that piracy has taken legitimate revenues from the legitimate providers and taken them to the 11 12 dirty companies? 13 If you include songwriters in those 14 providers, yes. 15 I certainly am. 16 Thank you. Because we are the most 17 legitimate providers at all. 18 0 Amen. I'm trying to get a sense of your 19 views about where we are economically. 20 piracy shrunk the pie for everyone; composers, 21 publishers and --22 It depends on what pie you are talking Α

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- 1 about. If you are talking the number of sales, yes.
- 2 If you are talking about the profit margins, that
- 3 may be a different thing.
- 4 Q Let's talk about the amount of gross
- 5 revenues to the entire music industry?
- 6 A Okay. A top line down to bottom. Yeah,
- 7 I'm sure.
- 8 Q Would you agree with me, Mr. Carnes, that
- 9 the real task going forward is to try to grow the
- 10 pie further and make it expand, to make gross
- 11 revenues in the industry bigger than they are today?
- 12 A Actually, I'm here representing
- 13 songwriters and I've seen the time when the gross
- 14 revenue swelled and we didn't make any more money.
- I saw that for 69 years. I saw that from 1909 to
- 16 1976. So if the pie expands, you know, and we don't
- 17 get any more, it means nothing to the songwriters.
- 18 We have got to make a living. We have to have
- 19 career opportunities. And if the rate is dropped to
- 20 the point where the pie swells but we make less
- 21 money, it's not going to do the songwriters any good
- 22 at all.

Page 243 If whatever rate this Court sets, whether 1 2 a percentage rate or a penny rate, if the pie gross 3 bigger is that ultimately to the benefit to songwriters? 4 5 Α If at any rate, no. 6 If it -- whatever rate it sets, if the pie 7 ultimately gross bigger and you get a portion of 8 that bigger pie, that's ultimately in the benefit of 9 songwriters; correct? 10 No. Once again that's a mathematical 11 problem. If the pie only expands this much but our 12 share of it goes down, we can lose money as the pie 13 If we get cut to a rate where it's half or 14 less, the pie would have to literally double just 15 for us to get back where we are now. So that 16 doesn't make any sense to me. Have you ever used one of the legitimate 17 18 digital music providers? 19 Α I'm a subscriber to Yahoo Music. 20 Would you agree that in the digital world the experience is different than in the physical 21 22 world?

|    | Page 244   |
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| 1  | MR. SMITH: Objection, Your Honor. Now I              |
| 2  | think we are going beyond the scope of the direct.   |
| 3  | JUDGE SLEDGE: Mr. Connolly?                          |
| 4  | MR. CONNOLLY: Your Honor, they have                  |
| 5  | suggested that there should be a higher rate for     |
| 6  | digital downloads. What I would like to get into is  |
| 7  | some of the benefits of digital.                     |
| 8  | JUDGE SLEDGE: Where is that in his                   |
| 9  | testimony?   |
| 10 | MR. CONNOLLY: The rates or I don't know              |
| 11 | exactly what paragraph that is in but the rates and  |
| 12 | terms of what he is asking, for a higher rate for    |
| 13 | digital over physical are certainly in here.         |
| 14 | MR. WISNIEWSKI: Mr. Connolly, are you                |
| 15 | referring to paragraph 21?                           |
| 16 | MR. CONNOLLY: I may well be, Your Honor.             |
| 17 | Your Honor, actually I think I'm referring to        |
| 18 | paragraph 19, which they are asking for a minimum of |
| 19 | 12.5 cents per songs on a physical phonograph and 15 |
| 20 | cents on digital.                                    |
| 21 | MR. WISNIEWSKI: Didn't mean to lead you              |
| 22 | astray.  |

Page 245 MR. CONNOLLY: You know, I could have done 1 2 that myself. I could have led myself astray. And, 3 Your Honor, I won't go any further on this line of questions, unless you obviously feel I should. 4 5 JUDGE SLEDGE: Overruled. 6 BY MR. CONNOLLY: 7 Would you agree that some consumers find the digital experience more attractive in terms of 8 9 purchasing music? 10 Yes. Α 11 And would you agree that part of that 12 attraction is that unlike the physical world, in the 13 digital world the digital music providers have enormous catalogs to choose amongst different songs? 14 15 Α Yeah. 16 So, for example, rather than going to Best 17 Buy or some other Wal-Mart and have an opportunity 18 to have 3,000 albums, if you were to go to iTunes or 19 Rapsody or others, a consumers has an opportunity to 20 go and look at a wide breadth of music; is that 21 right? 22 Α Yes. There is plenty of value in digital

Page 246 I think more. You don't have to get in the 1 music. 2 car to go there. 3 And one of the additional values is it has more breadth than in the physical world so the 4 5 consumer can see a wider catalog of songs, correct, 6 and it also has functions, search functions that 7 permit them to catalog their songs on their own 8 personal computer and search for new music; correct? Α 9 Yes. 10 Give them an opportunity to hear music 11 they might not be aware of otherwise by simply going 12 in the physical world and looking things up; 13 correct? 14 Д Yeah, in some cases. I mean --15 Q And for the songwriter, the composer of 16 the song that's in the catalogs that's much broader, 17 that's a benefit, is it not, in terms of the 18 opportunity that you have your works available on a broader scale? 19 20 But they are also getting -- the Α Yes. 21 value of these service, I mean once they get the 22 song they can burn it four or five times, so they

Page 247 1 are getting excess value, quite frankly. 2 0 Isn't that true in the physical world with 3 the CD also? 4 Well, you know, we never -- as a 5 songwriter where CDs are concerned, I never intended 6 my work to go out uncopy protected. The record 7 labels made that choice. 8 Do you see the digital marketplace and 0 9 digital world as the wave of the future? 10 where most music is going to be? 11 I renew my objection. Beyond MR. SMITH: 12 the scope of direct. The witness hasn't offered the 13 prospects for the future. 14 JUDGE SLEDGE: Sustained. 15 BY MR. CONNOLLY: 16 Would you agree that digital has -- in the 17 digital world there is an opportunity there to 18 dramatically expand the marketplace? 19 Yes. Well, only in -- it won't 20 dramatically expand the number of works created, but the access to them, probably yes. In other words, 21 if you have a body of music that's being created 22

Page 248 1 every year, and people can get to it, that's good. If you have a smaller body of music being created 2 3 every year that people interested in, you can expand the list all you want but the number that are bought 4 5 will actually contract. Can you go on a digital music service 6 7 today and find Longneck Bottle? 8 Α No. 9 Why is that? 10 Because Garth won't license it and he owns 11 the masters. 12 How about any of your other compositions? 13 Yes. A 14 Can you give me an estimate of about how 15 many of your compositions are out there in digital 16 music service? 17 Д No, I couldn't. 18 Mr. Carnes, I wish you luck. I have no 19 further questions. 20 THE WITNESS: Thank you, sir. 21 JUDGE SLEDGE: All right. Mr. Cohen. 22 MR. SMITH: I will forego the question I

|    | Page 249   |
|----|--|
| 1  | was going to ask. I have nothing further for the   |
| 2  | witness.   |
| 3  | JUDGE SLEDGE: Any other questions? Thank           |
| 4  | you, sir.  |
| 5  | MR. SMITH: Are you ready for him, Your             |
| 6  | Honor?   |
| 7  | Whereupon,   |
| 8  | STEVE BOGARD,                                      |
| 9  | called for examination by counsel, and having been |
| 10 | duly sworn, was examined and testified as follows: |
| 11 | JUDGE SLEDGE: Please be seated.                    |
| 12 | EXAMINATION CONDUCTED                              |
| 13 | BY MR. SMITH:                                      |
| 14 | Q Sir, would you state your name, please?          |
| 15 | A My name name is Steve Bogard.                    |
| 16 | Q What's your occupation?                          |
| 17 | A I'm a professional songwriter.                   |
| 18 | Q How long have you been a songwriter?             |
| 19 | A Over 40. Years, managed to claw my way to        |
| 20 | the upper middle. Almost 40 years.                 |
| 21 | (Copyright Owner Exhibit Number 2                  |
| 22 | was marked for identification.)                    |

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|----|---|
| 1  | Q I'm going to hand you a document that             |
| 2  | we've marked as Copyright Owner Trial Exhibit 2 for |
| 3  | identification. Have you seen this document before? |
| 4  | Can you tell us what this is?                       |
| 5  | A Yes, sir. This is my witness statement.           |
| 6  | Q Would you look at page 12, the                    |
| 7  | declaration, sir? Is that your signature?           |
| 8  | A Yes, sir, it is.                                  |
| 9  | Q And is everything that you wrote in               |
| 10 | Exhibit 2 true?                                     |
| 11 | A Yes, sir, it is.                                  |
| 12 | MR. SMITH: I would offer Exhibit 2, Your            |
| 13 | Honor.  |
| 14 | JUDGE SLEDGE: Any objection.                        |
| 15 | MS. MORAN: No objection from RIAA.                  |
| 16 | MR. CONNOLLY: No objection, Your Honor.             |
| 17 | JUDGE SLEDGE: It's admitted.                        |
| 18 | BY MR. SMITH:                                       |
| 19 | Q Mr. Bogard, would you tell us how you             |
| 20 | started being a songwriter?                         |
| 21 | A Started a band at 12, got a record deal at        |
| 22 | 16, we needed songs and moved on and worked in the  |

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|----|--|
| 1  | recording business and as a performer and long about |
| 2  | 1980 a song I had written eleven years prior to that |
| 3  | time was recorded by a Grammy winning artist named   |
| 4  | Marty Robins. It became a top ten hit and I had      |
| 5  | been considering Nashville as kind of a Paris of     |
| 6  | songwriting anyway and so I moved with my wife and   |
| 7  | two kids and no job and we headed for Nashville. So  |
| 8  | I moved there in about '82.                          |
| 9  | Q In the course of your songwriting career,          |
| 10 | can you tell us how many songs you've written?       |
| 11 | A I have written over 1,500 songs.                   |
| 12 | Q How many of those 1,500 songs have been            |
| 13 | recorded?  |
| 14 | A Well, hundreds I would say.                        |
| 15 | Q And  |
| 16 | A Over a hundred.                                    |
| 17 | Q Have you had some degree of commercial             |
| 18 | success?   |
| 19 | A Yes. I have been very lucky to have had            |
| 20 | some success.  |
| 21 | Q Would you give the Court a sense of some           |
| 22 | of your more successful songs?                       |
| ī  |  |

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| 1  | A I have had eight number one songs, 20 VMI        |
| 2  | and SCAP award winning songs, things for George    |
| 3  | Straight and Rebba McIntyre, and I have had a good |
| 4  | run.   |
| 5  | Q Have you received any awards or                  |
| 6  | recognition for your work?                         |
| 7  | A Yes, I have.                                     |
| 8  | Q What are those?                                  |
| 9  | A I was nominated for the Academy of Country       |
| 10 | Music Song of the Year for a song called Carried   |
| 11 | Away. I have eight CMA number one awards. And as I |
| 12 | said before, the most performed songs was the VMI. |
| 13 | I have twenty of those. This past year I was       |
| 14 | nominated for a Grammy as best country song. And   |
| 15 | next week I'm once again nominated for a best      |
| 16 | country song for Long Triple Love.                 |
| 17 | Q Are you going to win?                            |
| 18 | A Basically, all things television and I           |
| 19 | won't win, but can I hope.                         |
| 20 | Q Are you a member of any professional             |
| 21 | organizations relating to songwriters?             |
| 22 | A Yes.   |

Page 253 Which once? 0 I'm a member of -- obviously, I'm the Α President of the Nashville Songwriters Association. I'm a member of NARAS, the National Academy of Recording Arts and Sciences in both the producing and engineering wing and the composer wing. I'm a member of the Country Music Association, a graduate of Leadership Music. I think that's about it. How long have you been affiliated with, 0 can we call it NASI? I have been a member for 15 years and Ά about five years ago I got more and more involved and became a board member and I'm beginning, starting my third year as president if they decide

- Q Will you tell us a little bit about what
- 17 NASI is?

they want me.

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- 18 A Yes. It's the world's largest independent
- 19 trade organization for songwriters. We are
- 20 non-profit. Our missions are education and advocacy
- 21 and we have over a hundred regional workshops all
- 22 over the country and several foreign countries.

|    | Page 254   |
|----|--|
| 1  | Q What's the size of the organization?               |
| 2  | A We have 5,000, approximately 5,000                 |
| 3  | members. It varies. It goes up and down in total.    |
| 4  | And 500 of those are professional songwriters.       |
| 5  | Q 500 professionals?                                 |
| 6  | A Right.   |
| 7  | Q What is the advocacy mission of the NASI?          |
| 8  | A The advocacy mission, we do a lot of               |
| 9  | legislative work. I'm very proud that in '06 with    |
| 10 | over 2,000 individual visits to Congress with two or |
| 11 | three songwriters at a time and guitars and our      |
| 12 | stories, we spearheaded the Songwriters Tax Equity   |
| 13 | Act which corrected a decades long inequity in the   |
| 14 | U.S. tax code that said that when a creator sells    |
| 15 | the future income from the work, what we call a      |
| 16 | catalog, that he has to pay ordinary income on that  |
| 17 | sale just as he did on the income that had already   |
| 18 | come in, and that its corporate partner, which may   |
| 19 | be a Warner in my case, would only pay capital       |
| 20 | gains. With all our visits to Congress we managed    |
| 21 | to convince both sides of the isle that that wasn't  |
| 22 | fair. So now when songwriters sell a catalog, an     |

Page 255 income stream, they pay the capital gains rate that 1 2 the corporate partners pay. We also are very active in all kinds of 3 anti-piracy issues. Our executive director is in 5 Nashville right now working on a bill in the 6 Tennessee legislature to force the University of 7 Tennessee since they have been slapped on the wrist 8 to instigate some kind of technological file sharing 9 prevention that's going to cost them some money. So 10 we work on that. 11 We attend Grammys on the Hill in 12 association with NARAS, we lobby with RIAA, we 13 lobbied for the stronger protection act before 14 Congress right now and do anything we can to fight 15 piracy. 16 The third thing that we have been very 17 involved with especially during my tenure was last 18 year's section 115 enactment. We tried to weigh in 19 and give the songwriter point of view. 20 Mr. Bogard, would you turn to paragraph 15 21 of your written direct statement, and in that 22 paragraph you talk about work that you do with the

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- 1 recording industry on important issues facing
- 2 songwriters. Could you elaborate on that or
- 3 summarize that rather?
- A Well, this refers in a great sense to our
- 5 dreams and aspirations when this section 115 reform
- 6 bill came up. We were actually called by Chairman
- 7 Smith to ask what are the songwriter concerns, what
- 8 were our wish lists, what things could be fix that
- 9 had would make the copyright system work better for
- 10 songwriters and these things, transparency,
- 11 pass-through licensing, we found it, and still find
- 12 it amazing that in a world where you can watch a cup
- of coffee come out of your account from your master
- 14 card at Starbucks that songwriters wait sometimes 9
- 15 months, sometimes longer than that for the money to
- 16 come from the consumer to the record label to the
- 17 publisher to us. So those are all issues that we
- 18 were interested in as well as controlled comp. We
- 19 were very interested in trying to put an end to
- 20 controlled composition.
- Q Why is that?
- 22 A Controlled composition is a practice that

Page 257 started in, when, up in the early '80s that 1 2 basically for a songwriter like myself who isn't 3 necessarily an artist and is sometimes a producer 4 but not always a producer, if basically says if you 5 write a song with an artist or with a producer, you agree to take three-quarters of the statutory rate 6 7 and you agree that you'll abide by all the 8 stipulations that are in the artist's contract. 9 Like terms, like all the different things that the 10 record labels are allowed to withhold pending final distribution of monies. 11 12 And I've heard today the discussion of 13 agreeing to controlled composition and as an 14 on-the-street songwriter, you can tell obviously I'm 15 not a legal expert by any means, but as an 16 on-the-street songwriter, agreeing is really a, not 17 the right term for controlled composition. 18 pretty much sign them or don't get our song cut. 19 I should have asked you this at the 20 beginning. Where do you do your song writing these 21 days? 22 Α Where?

|    | Page 258   |
|----|--|
| 1  | Q What city?   |
| 2  | A Nashville, Tennessee.                              |
| 3  | Q And how many of the members of the NASI            |
| 4  | are in Nashville?                                    |
| 5  | A Well, almost all the pros are in                   |
| 6  | Nashville. Probably 90 percent of our professional   |
| 7  | writers are in Nashville. We have a few in some      |
| 8  | other cities. Our amateur members are scattered all  |
| 9  | across the country.                                  |
| 10 | Q What I would like to do is turn to what is         |
| 11 | the state of the professional songwriter community   |
| 12 | in Nashville today? Would you describe that for the  |
| 13 | court?   |
| 14 | A Well, we have about half of the                    |
| 15 | professional songwriters we did even five years ago. |
| 16 | The community is basically decimated. There are so   |
| 17 | few opportunities for new writers that the community |
| 18 | is dwindling. That's the only way I can put it.      |
| 19 | Q What is the reason for this decline?               |
| 20 | A Well, Nashville works similarly to the way         |
| 21 | New York City worked in the tin pan alley days.      |
| 22 | It's kind of a farm system. And basically a new      |

Page 259 writer -- and this is my story only 20 years ago. A 1 2 new writer comes to town and if he has some talent 3 and can show that he might be able to generate some income producing songs, he signs with a publisher. And the publisher generally gives me an advance on 5 6 the mechanical royalties. And that advance is kind of a steady draw, a way for that songwriter to 7 8 survive while he learns about his craft, while he 9 networks and meets other people, while he meets 10 producers and artists and just kind of learns the 11 And that's often a fairly long process. 12 Oftentimes, sometimes five years. And with the 13 incredible drop in mechanical royalties, it's just 14 clear that publishers cannot make the size or the 15 number of investments that they did in previous times it. 16 17 At the time I'm not longer writing for 18 Warner Chapel but I wrote as a staff writer for 19 Warner Chapel for every 20 years. 20 What does that mean? 21 Staff writer means that in return for the Α 22 exclusive rights to administered and exploit my

Page 260 work, I -- they give me X amount of dollars a month, 1 2 which they recoup out of my mechanical earnings. 3 it's basically a partnership where I'm on staff, my songs are not administered or I don't share the 5 income on my songs with anyone but them for the term 6 of the contract. 7 So at a certain stage of a writer's career 8 it's very desirable to be a staff writer because it 9 means you can hang in there and continue to try and 10 write and make something happen. And at the peak 11 of, at its largest Warner Chapel had over 200 staff 12 writers. And they are down to 90 some at the point, 13 including all kinds of bands that aren't really 14 writers that come in every day. So it's less than 15 half. 16 And as a president of NASI, we have six 17 executive committee meetings and six board meetings 18 a year. And it is, let me tell you, not nearly as 19 formal or urbane as this proceeding. It's basically 20 songwriters just talking about what's going on and 21 who is making a living and who is cutting back and 22 how things are going. And they are not going well.

Page 261 I happen to know, there are several other 1 2 major publishers whose rosters are well below half 3 of what they were in peak years. I've also got friends, number one, a major 4 5 mentor of mine, Charlie Black, who has had, couldn't He is a little older than I am, a hall 6 get a deal. 7 of fame songwriter and he has had to kind of give it 8 He is selling real estate in Florida. What's the reason for the decline in --9 10 The decline in mechanical royalties is the A 11 entire thing. It's very rare that a publisher 12 recops against performance fees. It's almost always 13 a mechanical royalty situation. And that's what 14 feeds the farm system that creates the diverse group 15 of songwriters who may not ever write a hit, who may 16 right wonderful album cuts that a few people like or 17 may write one hit every five years and survive that 18 way. 19 Would you turn to paragraph 20 of your 20 written direct statement, please? And in that 21 paragraph you talk about radio consolidation. Do 22 you see that?

|    | Page 262   |  |  |
|----|--|--|--|
| 1  | A Uh-huh. That's another that's another              |  |  |
| 2  | very important part of the mechanical royality       |  |  |
| 3  | stream drying up. Since radio has consolidated,      |  |  |
| 4  | many fewer albums come out. Singles, which it's      |  |  |
| 5  | great if you get one. But there are half as many.    |  |  |
| 6  | The albums that are recorded, instead of an artist   |  |  |
| 7  | like a George Straight doing an album every year,    |  |  |
| 8  | it's more of a two year cycle. So there are many     |  |  |
| 9  | few you are opportunities for a songwriter to get a  |  |  |
| 10 | song recorded.                                       |  |  |
| 11 | Q Would you turn to paragraph 21, the rate           |  |  |
| 12 | proposal?  |  |  |
| 13 | A Uh-huh.  |  |  |
| 14 | Q Are you familiar with the rate proposal            |  |  |
| 15 | that's been made by the copyright owners?            |  |  |
| 16 | A Yes.   |  |  |
| 17 | Q And has the NASI endorsed that proposal?           |  |  |
| 18 | A Yes. We wholeheartedly endorse it.                 |  |  |
| 19 | Q And do you understand that this proposal           |  |  |
| 20 | would result in an increase in mechanical royalties? |  |  |
| 21 | A Yes, sir, I do.                                    |  |  |
| 22 | Q And let me just ask the question and               |  |  |

Page 263 then -- and with respect to physical product, why do 1 2 you believe there should be an increase in the mechanical royalties? 3 Well, first, there is a philosophical 5 reason which says that the people who create the raw 6 materials upon which an entire industry is built 7 deserve to be compensated. We create the music and 8 the lyrics. And I have heard a lot of talk here about value and investment and that's all about 9 10 money. But songwriters bring value and they invest 11 their very lives. My song, just to digress for a 12 second. My song Long Trip Alone, comes from a piece 13 of paper I handed my wife as I went into full out 14 brain surgery on my head and that's a story about 15 what it's like to have somebody with you. 16 Now, I can't put a number value on it. 17 get to go to the Grammys, I'm excited about all 18 But our membership believes that the contribution of words in music is where it all 19 20 begins. It all begins with a song. 21 That being said, I also believe we deserve 22 an increase because publishers and writers are

Page 264 increasingly performing a lot of the A&R functions 1 that labels have traditionally done. Because, as 3 we've all heard, because the labels have big rosters, smaller staffs, it's very common at least 4 5 in Nashville, I can't speak for the rest of the 6 country, for a songwriter or a songwriter with his 7 publisher's investment to bring projects to labels 8 that are pretty much down the road, pretty much 80 9 to 90 percent there in terms of their sound and 10 quality in terms of what songs go where, in terms of 11 the entire idea of the project. So we do think that 12 our, that songwriters and publishers -- in fact,

16 A A&R is the traditional role in a record

publishers now call their creative staff A&R.

Just so we are using the term, what do you

17 label of choosing artists and the repertoire.

13

14

15

mean by A&R?

- 18 Chosing which songs go to which artists, how they
- 19 are presented, how they are produced, when they
- 20 sound like, the entire creation of the recording is
- 21 A&R. And we do feel that a lot of that is being
- 22 done by songwriters. We also feel, you know, the

Page 265 mechanical stream dwindling, there are a lot of 1 2 reasons. Obviously piracy, there is a lot of reasons for it. But we feel we are entitled to --3 What about on the download side, what are the reasons why the NASI endorses the proposal to 5 increase mechanicals? 6 7 We endorse that simply because the lack of expenses on the record label side, the lack of 8 trucking and shipping and plastic and shrink-wrap 9 10 makes -- it just highlights our contribution. write the lyrics and the music and we love the 11 artists and we love the investors in the artists but 12 13 we think the music and lyrics are very important and 14 when you put them in a digital setting where you hit 15 a button and then you get the song, we feel like our contribution is even greater. 16 17 From your perspective as the President of 0 18 the NASI, what would be the consequences of the 19 failure to raise the mechanical rates for the 20 songwriters community? 21 I think the consequences would be a Α 22 continuing downward spiral in publisher investment.

Page 266 I think the cultural contribution of the American 1 popular song around the world would diminish. 2 3 think that the kinds of songs like I Hope you Dance and I'm Moving On, and I was lucky enough to spend 5 some time on a once in a lifetime trip with my wife to Europe and I heard Somewhere Over the Rainbow, in 6 7 St. Mark's Square, I heard American music as the soul of music everywhere. And I don't think that if we take away the fertilizer, the farm, the system 10 that creates those kinds of songs and that kind of 11 music, I think America will -- it will just be another one of a number of things like maybe math, 12 13 science, manufacturing, that America is not the best 14 at anymore. 15 And I think we need this rate. 16 MR. SMITH: No further questions. 17 JUDGE SLEDGE: Cross-examination? 18 MS. MORAN: Molly Moran, on behalf of the 19 Recording Industries Association. 20 BY MS. MORAN: 21 Q Good afternoonMr. Bogard. My name is 22 Molly Moran and I'm here on behalf of RIAA. I just

Page 267 have a few questions for you today. 1 2 Α Sure. In your written statement and again today 3 0 in paragraph 15 of you're written statement you talk 4 5 about the number of professional songwriters having declined substantially? 6 That's correct. Α And Nashville being particularly hard hit; 8 0 9 correct? 10 Α That's correct. MS. MORAN: Your Honor, may I approach the 11 12 witness with an exhibit? I would like to show him a 13 document. 14 BY MR. STPHAO7: 15 Mr. Bogard, I'm going to show you what we Q 16 marked as RIAA Trial Exhibit Number 1. 17 Α Thank you. 18 I'll represent to you that that document 0 19 has been produced by your counsel as being from NASI 20 and you being identified as the witness for it. 21 Have you seen that document before? 22 Α Yes, I have.

|    | Page 268   |
|----|--|
| 1  | Q Is that document the NASI membership             |
| 2  | totals on an annual basis from 1997 through August |
| 3  | of 2007?   |
| 4  | A That's correct.                                  |
| 5  | Q And on that document there are, am I             |
| 6  | right, a number of categories of songwriters for   |
| 7  | NASI?  |
| 8  | A That's correct.                                  |
| 9  | Q There are four categories?                       |
| 10 | A Uh-huh.  |
| 11 | Q And one of those categories is                   |
| 12 | professional or pro, P-R-O?                        |
| 13 | A Right.   |
| 14 | Q Is that the does that row indicate the           |
| 15 | number of professional songwriters?                |
| 16 | A Yes, it does.                                    |
| 17 | Q Or members of NASI?                              |
| 18 | A Yes, it does.                                    |
| 19 | Q I would like to direct your attention to         |
| 20 | the number in the column for December of 1997. It  |
| 21 | indicates there are 526 professional songwriters   |
| 22 | with NASI in that year?                            |

|    | Page 269   |  |
|----|--|--|
| 1  | A Uh-huh.  |  |
| 2  | Q Looking forward, if you look at December           |  |
| 3  | of 2002, are there 555 songwriters with NASI in that |  |
| 4  | year?  |  |
| 5  | A Yes. Right. Correct.                               |  |
| 6  | Q And if you look at this last column which          |  |
| 7  | was August of 2007, are there 558 professional       |  |
| 8  | songwriters with the NASI?                           |  |
| 9  | A That's correct.                                    |  |
| 10 | Q So the NASI chart shows that the number of         |  |
| 11 | professional songwriters appears to have remained    |  |
| 12 | steady and slightly increased over the last decade,  |  |
| 13 | am I right?  |  |
| 14 | A No. It shows the number who are members            |  |
| 15 | of NASI has remained stable.                         |  |
| 16 | Q Would you repeat that?                             |  |
| 17 | A It shows that the number of professional           |  |
| 18 | songwriters who are members of NASI has maintained   |  |
| 19 | the same. It doesn't speak to the number of          |  |
| 20 | songwriters making a living in Nashville.            |  |
| 21 | Q What is your basis for your testimony              |  |
| 22 | about the number of songwriters in Nashville?        |  |

Page 270 Personal experience, my presidency and our 1 Α 2 membership. If you would like to know my analysis 3 as the president of NASI of these numbers and why they are the same, I would be happy to tell you. 5 I'm trying to get your understanding 0 No. 6 of the basis for your testimony. 7 The basis for my testimony is the 8 conversations I have on a monthly basis with all the 9 songwriters, with all the professional songwriters 10 who are members of our organization, with absolute knowledge, personal knowledge of the size of the 11 12 staff at Warner Chapel at the time I was a staff 13 writing and the size of the staff now. Other than that, it's ubiquitous and anecdotal. But I can 14 15 explain these numbers if you would like. 16 I'm just trying to get a sense of your 17 testimony as to why there has been a decline in the 18 national numbers. Your testimony in the written statement is based solely on anecdotal evidence, not 19 20 on hard numbers or surveys? 21 No, songwriters are like hearding cats. Α 22 There is no real survey. We know from the amount of

|    | Page 271  |
|----|---|
| 1  | members, and the reason we have more members now is |
| 2  | because our community is in dire straits. We have   |
| 3  | people joining like crazy. Ten years ago the NASI   |
| 4  | was kind of an organization to help little old      |
| 5  | ladies from Indiana learn to write songs.           |
| 6  | Q But NASI is the largest organization of           |
| 7  | songwriters today?                                  |
| 8  | A Yes, it is.                                       |
| 9  | Q Am I correct it's been four years since           |
| 10 | you have been under the Warner Chapel umbrella?     |
| 11 | A Yes.  |
| 12 | JUDGE ROBERTS: What's the difference                |
| 13 | between active and professional member?             |
| 14 | THE WITNESS: We make that distinction               |
| 15 | because of services, so we can provide education    |
| 16 | national services, which is a big part of what we   |
| 17 | do. So an associate is basically an amateur and an  |
| 18 | active is somebody whose had maybe maybe a little   |
| 19 | nibble, maybe one song recorded, on their way to    |
| 20 | maybe getting a deal.                               |
| 21 | JUDGE ROBERTS: As opposed to the                    |
| 22 | professional who that's their livelihood?           |

|    | Page 272   |  |  |  |
|----|--|--|--|--|
| 1  | THE WITNESS: Right. And there is a                   |  |  |  |
| 2  | different rate instructure. Not much. 50 bucks a     |  |  |  |
| 3  | year is the difference. But there is a whole         |  |  |  |
| 4  | different set of services that we try to offer for   |  |  |  |
| 5  | pros than for amateur.                               |  |  |  |
| 6  | JUDGE ROBERTS: And the student, I assume             |  |  |  |
| 7  | that's college and graduate student?                 |  |  |  |
| 8  | THE WITNESS: Yes.                                    |  |  |  |
| 9  | JUDGE ROBERTS: Thank you.                            |  |  |  |
| 10 | MS. MORAN: Your Honor, at this time I                |  |  |  |
| 11 | would like to move for the admission of RIAA Exhibit |  |  |  |
| 12 | 1.   |  |  |  |
| 13 | JUDGE SLEDGE: Any objection?                         |  |  |  |
| 14 | MR. SMITH: No objection, Your Honor.                 |  |  |  |
| 15 | JUDGE SLEDGE: It's admitted.                         |  |  |  |
| 16 | BY MS. MORAN:  |  |  |  |
| 17 | Q Mr. Bogard, you also testify in your               |  |  |  |
| 18 | written statement and today about music piracy; is   |  |  |  |
| 19 | that correct?  |  |  |  |
| 20 | A Yes.   |  |  |  |
| 21 | Q And all the steps that NASI is taking in           |  |  |  |
| 22 | that regard?   |  |  |  |

|    | Page 273   |
|----|--|
| 1  | A Yes.   |
| 2  | Q Would you agree that record companies are          |
| 3  | also undertaking an efforts to combat music piracy?  |
| 4  | A Absolutely. We are in constant contact.            |
| 5  | We recently called Mitch Bainwol about a misquote in |
| 6  | the Washington Post about the label suing somebody   |
| 7  | for making CDs off their own computer and the        |
| 8  | reporter got it all wrong. The guy was actually on   |
| 9  | a bunch of peer to peer things and NASI, we are the  |
| 10 | ones who called. We are all over it.                 |
| 11 | Q You also agree that the RIAA also takes            |
| 12 | efforts to combat piracy?                            |
| 13 | A Absolutely.  |
| 14 | JUDGE SLEDGE: The RIAA response to that              |
| 15 | article got no coverage compared to the article,     |
| 16 | like all bad publicity.                              |
| 17 | THE WITNESS: You are right, Your Honor.              |
| 18 | Q And that when RIAA and yourself undertake          |
| 19 | these efforts to prevent piracy, that you and        |
| 20 | songwriters also benefit from those efforts; is that |
| 21 | correct?   |
| 22 | A Absolutely.  |

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               MR. MORAN: I have no further questions at
 1
     this time. Thank you.
               JUDGE SLEDGE: Shall we take a few
 3
    minutes?
 5
               MR. SMITH: We could take five or a couple
 6
    minutes, that would be most appreciated.
 7
               JUDGE SLEDGE: Let's recess for 5 minutes.
 9
                   (Recessed at 4:15 p.m.)
10
                  (Reconvened at 4:21 p.m.)
11
12
               JUDGE SLEDGE: Thank you. We will come
13
    back to order.
    BY MR. CONNOLLY:
14
15
          Q
              Mr. Bogard, good afternoon. I'm Tom
     Connolly?
16
17
          A
               Good afternoon, Tom.
18
               Mr. Bogard, you testified in your direct
          Q
19
     testimony this afternoon that you wanted to put an
     end to the controlled composition clauses; correct?
20
21
          Α
               I think that would be wonderful.
22
          Q Have you been instrumental in efforts to
```

|    | Page 275   |
|----|--|
| 1  | do that?   |
| 2  | A I tried to do my part.                             |
| 3  | Q You are aware that the case of digital             |
| 4  | music for the most part there is no more application |
| 5  | for controlled comp?                                 |
| 6  | A Yes, I am aware of that.                           |
| 7  | Q Thank you.   |
| 8  | A And happy about it as well.                        |
| 9  | Q Thank you. Mr. Bogard, I believe that you          |
| 10 | testified that your group was supporting a higher    |
| 11 | rate for digital downloads than physical downloads;  |
| 12 | is that correct?                                     |
| 13 | A Well, physical downloads meaning?                  |
| 14 | Q CDs?   |
| 15 | A Yes, we were. Yes, we are.                         |
| 16 | Q And part of that justification is that             |
| 17 | vis-a-vis the record labels your contributions are   |
| 18 | greater in an arena where the record label's costs   |
| 19 | are lower; correct?                                  |
| 20 | A Correct.   |
| 21 | Q So the comparison is your relative                 |
| 22 | contribution to the record labels; correct?          |

|    | Page 276   |  |  |
|----|--|--|--|
| 1  | A Correct.   |  |  |
| 2  | Q All right. I want to talk about                    |  |  |
| 3  | contributions that DiMA members make to the ultimate |  |  |
| 4  | product, the download, for example. Would you agree  |  |  |
| 5  | with me that they make contributions to the ultimate |  |  |
| 6  | product, the DiMA member company?                    |  |  |
| 7  | A To the ultimate to the delivery?                   |  |  |
| 8  | Q To the deliver of the product?                     |  |  |
| 9  | A To the delivery, absolutely.                       |  |  |
| 10 | Q And they add value to consumer in terms            |  |  |
| 11 | the attractiveness of the product?                   |  |  |
| 12 | A Absolutely.  |  |  |
| 13 | Q And those are contributions that say               |  |  |
| 14 | iTunes makes to the product; correct?                |  |  |
| 15 | A To the delivery of the product.                    |  |  |
| 16 | Q And contributions that say Rapsody makes           |  |  |
| 17 | to the delivery of the product, correct, and the     |  |  |
| 18 | other DiMA members that you are aware of?            |  |  |
| 19 | A Sure.  |  |  |
| 20 | Q So in setting the rate and talking about           |  |  |
| 21 | the relative contributions here, should the Court    |  |  |
| 22 | ignore the contributions of DiMA members in the mix? |  |  |

|    | Page 277   |  |
|----|--|--|
| 1  | A No one is suggesting that the Court should         |  |
| 2  | ignore.  |  |
| 3  | Q And would you agree that those                     |  |
| 4  | contributions are technological innovations?         |  |
| 5  | A Yeah.  |  |
| 6  | Q All right. And capital investment?                 |  |
| 7  | A Right.   |  |
| 8  | MR. SMITH: Your Honor, I'm going to                  |  |
| 9  | object to this line as being beyond the scope of the |  |
| 10 | direction.   |  |
| 11 | MR. CONNOLLY: Your Honor, again we have a            |  |
| 12 | witness who says there is justification for higher   |  |
| 13 | increases for digital downloads based on             |  |
| 14 | contributions and I want to make sure that the       |  |
| 15 | contributions of the people that are actually making |  |
| 16 | the technology investments are not ignored. It's as  |  |
| 17 | simple as that.                                      |  |
| 18 | JUDGE SLEDGE: Sustained.                             |  |
| 19 | MR. CONNOLLY: Brief indulgence. Sir, I               |  |
| 20 | want you to have a good day. I have no further       |  |
| 21 | questions.   |  |
| 22 | THE WITNESS: Thank you. I appreciate it.             |  |

```
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     Thank you, Your Honor.
 1
               JUDGE SLEDGE: Any further questions?
 2
                           Nothing further, Your Honor.
 3
               MR. SMITH:
                               It being five minutes, I
               JUDGE SLEDGE:
 4
 5
     don't believe we should start any witness. We will
     recess until 9:30 in the morning.
 6
                (Whereupon, at 4:25 p.m., the
 7
 8
                hearing was recessed.)
 9
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|    | Page 279   |  |  |
|----|--|--|--|
| 1  | UNITED STATES OF AMERICA )                         |  |  |
| 2  | ss:  |  |  |
| 3  | DISTRICT OF COLUMBIA )                             |  |  |
| 4  | I, ROBERT M. JAKUPCIAK, an RPR and Notary          |  |  |
| 5  | Public within and for the District of Columbia, do |  |  |
| 6  | hereby certify:                                    |  |  |
| 7  | That the within is a true and accurate             |  |  |
| 8  | transcript of the proceedings taken on January 28, |  |  |
| 9  | 2008.  |  |  |
| 10 | I further certify that I am not related to         |  |  |
| 11 | any of these parties to this action by blood or    |  |  |
| 12 | marriage and that I am in no way interested in the |  |  |
| 13 | outcome of this matter.                            |  |  |
| 14 | IN WITNESS WHEREOF, I have hereunto set my         |  |  |
| 15 | hand this $28$ day of $January$ , 2008.            |  |  |
| 16 |  |  |  |
| 17 |  |  |  |
| 18 |  |  |  |
| 19 | Robert M. Jakupciak                                |  |  |
| 20 |  |  |  |
| 21 | My Commission Expires:                             |  |  |
| 22 | December 14, 2008                                  |  |  |

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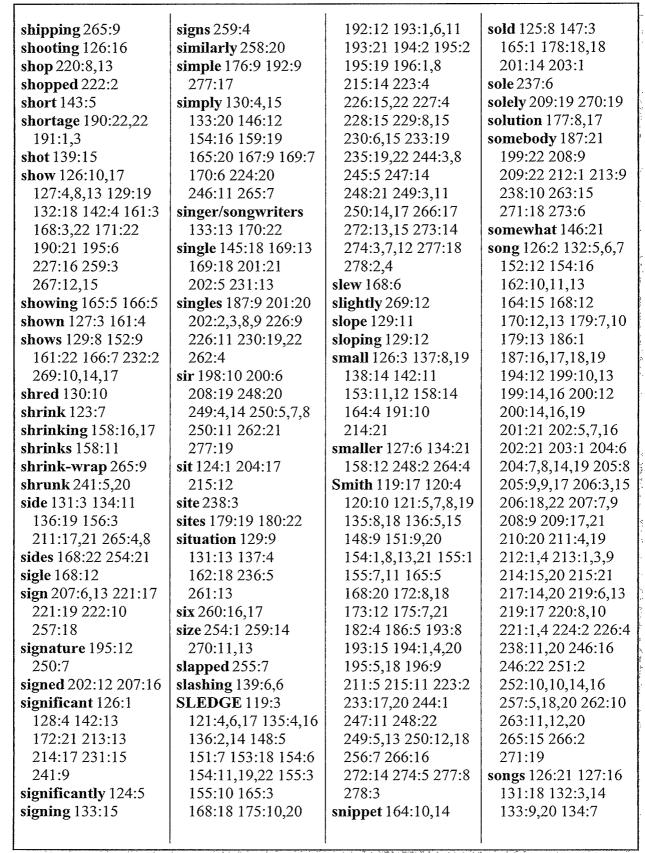
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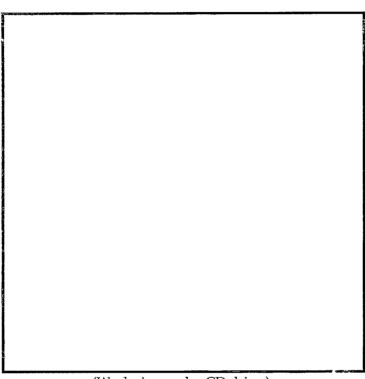
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